(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [05/30/91]

CASE NBR: [90107210] CFY STATUS: [DECIDED]
SHORT TITLE: [Fernandez, Carlos]
VERSUS [United States] DATE DOCKETED: [02149 1]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jan 9 1991	G	Application (A90-543) to extend the time to file a petition for a writ of certiorari from January 16, 1991 to February 15, 1991, submitted to Justice Souter.
2	Jan 14 1991		Application (A90-543) granted by Justice Souter extending the time to file until February 15, 1991.
3	Feb 14 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Mar 26 1991		Order extending time to file response to petition until April 24, 1991.
7	Apr 24 1991		Brief of respondent United States in opposition filed.
8	May 1 1991		DISTRIBUTED. May 16, 1991
9	May 8 1991	X	Reply brief of petitioner Carlos Eduardo Fernandez filed.
11	May 20 1991		REDISTRIBUTED. May 23, 1991
13	May 28 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun and Justice O'Connor join.

Last page of docket

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13	May 28 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun and Justice O'Connor join. (Detached opinion.)

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EDITOR'S NOTE:

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No. 90-7210

Original Manuscript

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

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CARLOS EDUARDO FERNANDEZ -

PETITIONER PRO SE

v.

UNITED STATES OF AMERICA -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CARLOS EDUARDO FERNANDEZ,
Federal Register No.22871-004
United States Penitentiary
P.O. Box 1000
Lewisburg, Pa. 17837

Petitioner Pro Se

NOTE: APPLICATION FOR ENLARGEMENT OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI, PURSUANT TO SUPREME COURT RULE 13.6, GRANTED BY MR. JUSTICE SOUTER, AND ENLARGING TIME FOR FILING PETITION TO AND INCLUDING FEBRUARY 15, 1991. SEE, APPENDIX, A-49. FILING IS HEREBY IN COMPLIANCE WITH SUPREME COURT RULE 29.2 (DEPOSIT IN PRISON MAILING SYSTEM ON OR BEFORE DUE DATE)

90-7210

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS.....ii - iv

QUESTION PRESENTED.....v

OPINIONS BELOW.....2

JURISDICTION.....3-4

CONSTITUTIONAL PROVISION INVOLVED.....4

STATEMENT OF THE CASE.....4-6

STATEMENT OF FACTS..... .6-15

REASONS WHY CERTIORARI REVIEW IS THOUGHT TO BE WARRANTED AND IMPERATIVE.....15-22

ARGUMENT.....23-28

CONCLUSION.....29

CERTIFICATE OF SERVICE.....Attached at end of Petition

PRO SE APPENDIX.....Separately submitted

TABLE OF CITATIONS

CASES — PAGE NUMBER(S)

BALL v. UNITED STATES, 470 U.S. 856 (1985).....10-14,19-21, 25, 28

BENTON v. MARYLAND, 395 U.S. 784 (1969).....26

BRADY v. MARYLAND, 373 U.S. 83 (1963).....18

BROWN v. OHIO, 432 U.S. 161 (1977).....23, 27

GARRETT v. UNITED STATES, 471 U.S. 773 (1985)...15, 24

JEFFERS v. UNITED STATES, 432 U.S. 137 (1977)...8-10,15-16,19-21.23-24,27

MISSOURI v. HUNTER, 459 U.S. 359 (1983).....19

NORTH CAROLINA v. PEARCE, 395 U.S. 771 (1969)...23

RAY v. UNITED STATES, 481 U.S. 736 (1987).....26

UNITED STATES v. AGUILAR, 849 F.2d 92 (3rd Cir. 1987).....8, 15, 23-24

UNITED STATES v. AIELLO, 771 F.2d 621 (2nd Cir. 1985).....13, 17

UNITED STATES v. ALVAREZ, 860 F.2d 801 (7th Cir. 1988).....16

UNITED STATES v. BENEVENTO, 836 F.2d 60 (2nd Cir. 1987).....15

UNITED STATES v. BOND, 847 F.2d 1233 (7th Cir. 1988).....16-17

UNITED STATES v. BURT, 765 F.2d 1364 (9th Cir. 1985).....16

UNITED STATES v. CRUZ, 805 F.2d 1464 (11th Cir. 1986), cert denied, 107 S.Ct. 1631 (1987).....16

UNITED STATES v. FERNANDEZ, 822 F.2d 382 (3rd Cir. 1987), cert denied, 484 U.S. 963 (1987) (FERNANDEZ I).....2,5,9,

UNITED STATES v. FERNANDEZ, 916 F.2d 125 (3rd Cir. 1990).....(FERNANDEZ II).....2,5,9,13-14

UNITED STATES v. GADDIS, 424 U.S. 544 (1976).....27,28

UNITED STATES v. GOMBERG, 715 F.2d 843 (3rd Cir. 1983)..8-12, 18

UNITED STATES v. GRAYSON, 715 F.2d 843 (3rd Cir.1986), cert denied, 107 S.Ct. 1899 (1987).....8, 11-12, 16-17

UNITED STATES v. GRUBBS, 829 F.2d 18 (8th Cir. 1987) (per curiam).....16

UNITED STATES v. HERNANDEZ-ESCARSEGA, 886 F.2d 1560 (9th Cir.), cert denied, 110 U.S. 3237 (1990).....14

UNITED STATES v. JEFFERSON, 714 F.2d 689 (7th Cir. 1983), vacated and remanded, 474 U.S. 806 (1985).....16

UNITED STATES v. MAULL, 806 F.2d 1340 (8th Cir.1986), cert denied, 480 U.S. 907 (1987).....17, 26

UNITED STATES v. MENDOZA, 902 F.2d 693 (8th Cir. 1990)..25, 26

UNITED STATES v. MICHEL, 588 F.2d 986 (5th Cir.), cert denied, 475 U.S. 1021 (1986).....15-16

UNITED STATES v. MOYA-GOMEZ, 860 F.2d 706 (7th Cir. 1988).....16

UNITED STATES v. OSORIO ESTRADA, 751 F.2d 128 (2nd Cir. 1984), modified on other grounds 757 F.2d 27 (2nd Cir. 1985).....17

UNITED STATES v. PETERS, 791 F.2d 1270 (7th Cir.), cert denied, 479 U.S. 847 (1986).....16

UNITED STATES v. POSSICK, 849 F.2d 332 (8th Cir. 1988)..17

UNITED STATES v. RAIMONDI, 721 F.2d 476 (4th Cir. 1983) (per curiam), cert denied, sub nom, Bello v. United, 469 U.S. 837 (1984).....15

UNITED STATES v. SHUSTER, 796 F.2d 337 (6th Cir. 1985), cert denied, 475 U.S. 1021 (1986).....16-17

UNITED STATES v. SMITH, 703 F.2d 627 (D.C. Cir. 1983) (per curiam).....15

UNITED STATES v. STALLINGS, 810 F.2d 973 (10th Cir. 1987).....16, 17

UNTIED STATES v. TORRES, 862 F.2d 1025 (3rd Cir. 1988)..8

WHALEN v. UNITED STATES, 445 U.S. 684 (1980).....27

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT.....4,10,11

STATUTES

TITLE 18, UNITED STATES CODE

§922(h)(1).....11

§2113(a) & (d).....27

§3013.....5, 26

§3013(a)(2)(A).....7

§4161.....7

App. § 1202(a)(1).....11

TITLE 21, UNITED STATES CODE

§ 843(b).....6

§ 846.....4,6-8, 10,24

§ 848.....4,6-8,15,19,26

§ 952(a).....4,6,10

TITLE 28, UNITED STATES CODE

§ 1254(1).....3

RULES

SUPREME COURT RULES OF PROCEDURE

10.1(a) & (c).....3, 22

13.1.....3

FEDERAL RULES OF CRIMINAL PROCEDURE

35(a).....2-3,5,7,22

PUBLIC LAWS

91-513.....4

98-473.....2, 26

MISCELLANEOUS

8A MOORE & WAXNER, MOORE'S FEDERAL PRACTICE, PARA. 2908 [3] (MAR. 1988 REV.).....16

QUESTION PRESENTED FOR REVIEW

WHEN FEDERAL NARCOTICS CONSPIRACY VIOLATIONS ARE DEEMED LESSER-INCLUDED OFFENSES OF A 21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE OFFENSE (CCE); DOES THE CONTINUED MAINTENANCE OF THE LESSER-INCLUDED CONSPIRACY "CONVICTIONS" IN CONJUNCTION WITH THE GREATER CCE OFFENSE, AND UNDER THE RUBRIC OF A "GENERAL SENTENCE", CONSTITUTE CUMULATIVE PUNISHMENT IN DEROGATION OF CONGRESSIONAL INTENT AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUARDO FERNANDEZ -

PETITIONER Pro Se

v.

UNITED STATES OF AMERICA -

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CARLOS EDUARDO FERNANDEZ, Petitioner Pro Se (hereafter, "Petitioner" or "Fernandez" interchangably), respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered on October 18, 1990. See, Appendix A, A-44 thru A-48. 1./

1./ A Pro Se Appendix has been prepared for the convenience of the Court. Designations to this Appendix hereafter will be as follows: "A-__ or B-__" .

OPINIONS BELOW

On October 18, 1990, the United States Court of Appeals for the Third Circuit issued a published opinion (reported at United States v. Fernandez,916 F.2d 125 (3rd Cir. 1990), affirming the May 21, 1990 Judgement of the United States District Court for the District of New Jersey, granting and denying in part the Petitioner's Motion to Correct an Illegal Sentence pursuant to Federal rule of Criminal Procedure 35(a).[2./] The Third Circuit's published opinion affirming the judgement of the District Court is found in in the Pro Se Appendix. A-44 - A-48. The May 9, 1990 unpublished opinion of the District Court denying and granting in part the Petitioner's Rule 35(a) motion is found in the Appendix. A-13 - A-16. The unpublished District Court resentencing hearing transcript and opinion, denying the Petitioner's Motion for Reconsideration of the District Court's May 9, 1990 opinion/order, is found in the Appendix. A-17 - A-37. The May 21, 1990 Judgement Resentencing Order of the District Court from which appeal was taken to the Third Circuit, is found in the Appendix. B-2. Finally, and for the convenience of the Court; the June 30, 1987 opinion of the Third Circuit affirming the Petitioner's conviction (but noting that Petitioner should resort to Rule 35 to correct apparent problems with his sentence), published at United States v. Fernandez, 822 F.2d 382 (3rd Cir. 1987), is found in the Appendix. A-38 - A-43.

2./ Petitioner's crime occurred before November 1, 1987 (the date when the Federal Sentencing Guidelines and corollary amendments to the Federal Code and Rules of Procedure took effect. See, Public Law 98-473. Hence, Rule 35(a),as applicable to the Petitioner, pertains to the pre-Sentencing Guideline version. See, Editorial Notes under Rule 35, Federal Rules of Criminal Procedure (West 1988 Cummulative Supplement). That version read:"(a) The court may correct an illegal sentence at any time and may corect a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." (Petitioner's emphasis).

JURISIDCTION

On October 18, 1990, the United States Court of Appeals for the Third Circuit issued its published opinion (reported at United States Fernandez, 916 F.2d 125 (3rd Cir. 1990), affirming the the May 21, 1990 judgement of the United States District Court for the District of New Jersey, granting and denying,** in part, Petitioner's motion to correct an illegal sentence. The jurisdiction of the district court was predicated upon Fed. R.Crim. P. 35(a) (cf., n. 2, supra). The appellate jurisdiction of the United States Court of Appeals for the Third Circuit over the Petitioner's appeal from the dispostive judgement of the district court, was predicated upon Title 28 U.S.C. § 1291. The Jurisdiction of this Honorable Court to entertain the Petition for writ of certiorari is predicated upon Title 28 U.S.C. § 1254(1). See , also, Supreme Court Rule 10.1 (a) & (c). Also, cf., Supreme Court Rule 13.1: ("A petition for writ of certiorari to review a judgement in any case, civil or criminal, entered by a . . . United States Court of Appeals shall be deemed in time when it is filed with the Clerk of Court within 90 days after the entry of the judgement . . ."). Per Order of the Honorable, Mr. Justice David H. Souter, sitting as Circuit Justice for the Third Circuit, the due-date for the filing of this petition for certiorari is February 15,1991. See, A-49. Filing is accomplished in conformity with Supreme Court

** All emphasis indicated in this Petition is that of the Petitioner, unless other explicitly indicated.

Rule 29.2 (deposit of petition in the prison mailing system on or before due day).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

After a lengthly jury trial in December, 1985, Fernandez was convicted in the United States District Court (hereafter, "District Court") for various narcotics offenses, which, of relevance here, included: (1) conspiracy to distribute cocaine in violation of 21 U.S.C. § 864 (**Count 1**); (2) Conspiracy to Import cocaine in violation of 21 U.S.C. § 952(a)(**Count 2**), and (3) Engaging in a Continuing Criminal Enterprise (hereafter, "CCE" or §848, interchangeably), in violation of 21 U.S.C. § 848 (**Count 3**).[3./]

3./ The reference to § 848 is to the version of the offense as it read during its original enactment. Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.

Petitioner's convictions were affirmed in all respects by the United States Court of Appeals for the Third Circuit (hereafter, "Third Circuit") on direct appeal in an opinion published at, United States v. Fernandez, 822 F.2d 382 (3rd Cir. 1987) (Fernandez I). Certiorari review was denied by this Honorable Court on November 30, 1987. See, Fernandez v. United States,(No. 87-346) 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 391 (1987). Thereafter, Petitioner filed a motion pursuant to Fed. R. of Crim. P. 35(a) "to strike the convictions and sentences imposed on Counts 1 and 2 (A-14)" on double jeopardy and due process grounds (A-45). By order dated May 21, 1991 (but entered on the docket of the district court on May 24, 1991) (A-44 & B-2), the district court granted the Petitioner's motion, in part, by striking the fines imposed on Counts 1 & 2, as well as the sentences on those Counts, which had theretofore been imposed and ordered to run concurrently with Count 3 (CCE Count). The District Court, however, denied the Petitioner's Rule 35(a) motion, in part, by refusing to vacate the convictions imposed on Counts 1 & 2 (and special assessments as a corollary thereto which were imposed pursuant to Title 18 U.S.C. §3013), opting instead to "combine" the convictions on Counts 1 & 2, with the greater-offense conviction on Count 3 , and then impose a "general sentence" upon the convictions in Counts 1,2, & 3. On October 18, 1990, in a published opinion, the Third Circuit affirmed the judgement of the district court. See, Fernandez v. United States, 916 F.2d 125 (3rd Cir. 1990) (Fernandez II). On January 14, 1991, The Honorable, Mr. Justice David H. Souter granted the Petitioner's motion for an enlargement of time for filing a petition for writ of certiorari to and

including February 15, 1991 (A-49). This petition for writ of certiorari now follows.

STATEMENT OF THE FACTS

The salient facts pertinent to this petition for writ of certiorari are relatively uncomplicated and undisputed. Petitioner, inter alia, was convicted in **Count 1** of his indictment for conspiring to distribute cocaine, in violation of 21 U.S.C. §846; in **Count 2** for conspiring to import cocaine, in violation of 21 U.S.C. § 952(a); and, in **Count 3**, of engaging in a CCE offense, in violation of 21 U.S.C. § 848. When Fernandez was originally sentenced on February 7, 1986, the district court sentenced him as follows:

"Count	Charge	Sentence
1	Conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.	20 years imprisonment to be served concurrently with sentence imposed on Count 3, $100,000 fine.
2	Conspiracy to import cocaine in violation of 21 U.S.C. § 952(a).	20 years imprisonment to be served consecutively to the sentence imposed on Count 1 and concurrently with the sentence imposed on Count 3, $100,000 fine.
3	Engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848.	40 years imprisonment and $100,000 fine.
10, 11, 12, 19, 27	Using a communications facility to facilitate narcotics violations in violation of 21 U.S.C. § 843(b)	4 years imprisonment on each count to be served consecutively to each other but concurrently with the sentences imposed on Counts 1, 2, and 3.

The total sentence was 40 years imprisonment and a $300,000 fine together with an aggregate of $400 in special assessments as mandated by statute (A-13 - A-14)."[4./] Though the Petitioner's convictions were affirmed in all respects on direct appeal, cf., Fernandez I (A-38 - A-43, the Third Circuit did note, however, that "While there may be problems with the formal terms of the sentence , the matter was not raised before us and in all events it may be presented to the district court. See Fed. R. of Crim. P. 35." Id. at 822 F.2d at 383 n. 2 (A-39). Thereafter, proceeding pro se, Petitioner filed a Rule 35(a) motion in the district court urging that "the conspiracy convictions and sentences at Count One and at Count Two of the Indictment against defendant Fernandez, in the instant case, must be stricken, as a matter of law." A-4.[5./] The United States Attorney, by letter dated January 19, 1990 (A-7 - A-9), disputed the Petitoner's claim that Jeffers v. United States, infra obligated the district court to vacate the Petitioner's lesser-included offense convictions on the conspiracy charges set forth in Counts 1 & 2. Though not disputing (but acknowledging)that Third Circuit cases have held that § 846 conspiracy is a lesser included offense of § 848 (A-7); the Government nonetheless argued that the appropiate remedy for the problem it perceived inherent in the formal terms of the originally imposed sentence, was for the district court to "impose

4./ The statute alluded to by the District Court is 18 U.S.C. § 3013(a)(2)(A), which provides:"The court shall assess on any person convicted of an offense against the United States [,] in the case of a felony [,] the amount of $50 if the defendant is and individual. . ."

5./ Petitioner cited the Third Circuit decision in United States

a so-called "general sentence" for both the greater and lesser offenses which may not exceed the maximum authorized sentence of the greater offense (A-8):

> "Accordingly, the United States submits that the Court should correct the judgement of conviction by vacating the present individual sentences and imposing a "general sentence" on all counts of Indictment No. 85-86. The United States submits further that the sentence imposed should be identical to the present sentence imposed on Count 3, the CCE count, of 40 years imprisonment and $100,000 fine. However, as the Third Circuit cases 6./ cited in this letter make clear, the Court should not vacate any of the lesser included convictions themselves. A-9.

In a reply to the government's letter-response; Petitioner reasserted his position that the lesser-included offense rationale of Aguilar, supra, "mandate[d] that the "convictions," which constitute lesser included offenses in the offense of conducting a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848, must be vacated and set aside." A-11. In its opinion dated March 9, 1990 (A-13 - A-16), the District Court acknowledged that Fernandez was moving the court "to strike the convictions and setnences imposed on Counts 1 and 2, relying on the holding in United States v. Aguilar, [supra] that a prior conviction of a drug conspiracy in violation of 21 U.S.C. § 846 barred on double jeopardy grounds

n.5 continued/ v. Aguilar, 849 F.2d 92 (3rd Cir. 1988). Reading and applying this Court's precedent in Brown v.Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), as well as Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); the Third Circuit in Aguilar held that conpiracy under 21 U.S.C. § 846 was a lesser included offense of the CCE offense under § 848, because in concert activity pursuant proscribed by § 848 is synonymous with conspiracy proscribed by § 846. 849 F.2d at 98 & notes 10 & 11.

6./ The cases referred to are United States v. Gomberg, 715 F.2d 843 (3rd Cir. 1983); United States v. Grayson, 795 F.2d 278 (3rd Cir. 1986), cert denied 107 S.Ct. 1899 (1987); United States v. Torres, 862 F.2d 1025 (3rd Cir. 1988).

a subsequent continuing criminal enterprise prosecution which included the drug conspiracy as an element of the offense." A-14. The district court disputed the Petitioner's claim that double jeopardy and due process principles mandated vacatur of the lesser-included offense convictions and resultant penalties threfrom, by first distinguishing Aguilar, supra from Fernandez I, supra on the ground that Aguilar was a multiple prosecution case, whereas Fernandez, supra entailed a question of mutiple punishments. A-14 - A-15. The district court thought that adherence to this Court's decision in Jeffers v. United States, supra required no more than that the court "ensure the sentence does not exceed that which may, under the statute, be imposed on the continuing criminal enterprise count." A.15. In conformity with the government's argument and the Third Circuit teaching in United States v. Gomberg, supra, the District Court held:

> "When the continuing criminal enterprise count includes among its elements conspiracy and substantive counts, the sentencing court is directed '"to impose a general sentence on all counts for a term no exceeding the maximum possible sentence on the count authorizing the greatest penalty."' 715 F.2d at 851, 852". A-15.

In consequence of this holding, the district court conluded that conformity with due process and double jeopardy principles required no more than reduction of the cummulative fine of $300,000 ($100,000 per Counts 1, 2 & 3) be reduced to $100,000 for Counts 1 thru 3 in combination." The court ordered a resentencing hearing transpire to effectuate this change in the terms of the original sentence as regards to Counts 1 thru 3 (conspiracy Counts and CCE Count). A-15. At the commencement of the District Court ordered "resentencing proceeding," the court took up the question of the Petitioner's motion for reconsideration

of the March 9, 1990 opinion . A-18. Now represented by counsel; the Petitioner argued that the decisions of this Court in Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), in conjunction with Jeffers v. United States, supra, instructed that a conviction for a lesser-included offense constitutes punishment unintended by Congress and impermissible under the double jeopardy jurisprudence of this Court construing the Fifth Amendment (A-19). Rejecting this contention, the district court stated that,"Multiple punishment is avoided by limiting the punishment (sentence) to the maximum provided by the principal offense (A-21):

> "Thus, under Jeffers and Gomberg the total sentence may not be greater than that provided for the CCE offense. However, it provides no support for defendant's contention that his convictions on Section 846 and Section 952(a) conspiracy charges should be vacated. Those convictions were obtained in a single prosecution and trial and there are no double jeopardy implications. Therefore defendant's motion for reconsideration of my March 9, 1990 opinion will be denied." (A-22). . .
>
> "Consequently, the formal order on resentencing will be, for the reasons previously set forth in opinions of the Court, the Court hereby vacates the sentence previously imposed on February 7, 1986. On Count 1,2, & 3 the Court imposes a general sentence wherein the defendant wherein the defendant is committed to the custody of the Attorney General or his authorized representative for a term of 40 years, and defendant is also fined the sum of $100,000 on this sentence. On Counts 10, 11, 12, 19 and 27, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of four years on each count to be served consecutively to each other, but concurrently with the general sentence imposed on Counts 1, 2, and 3.
>
> Special assessment of $50 is imposed on each of the eight counts for a total of $400. That will be the determination of the resentencing procedure." A-35 - A-36.

On Appeal, the third Circuit acknowledged that Petitioner "contends that the court erred in not vacating the sentences on counts 1 and 2, concerning conspiracies, as, in his view, "the double-jeopardy proscription" and the due process clause of the Fifth Amendment preclude "cumulative punishment" for the continuing criminal enterprise and predicate offenses." A-45. The court acknowledged that"the district court in resentencing [the Petitioner] followed the procedure specified in United States v. Gomberg, 715 F.2d at 851-52. Id. With respect to the Petitioner's contention that "Gomberg [was] overruled to the extent germane here by Ball v. United States [supra,]"; the Third Circuit noted that:

> In Ball a previously convicted felon was convicted and sentenced both for receiving a firearm shipped in interstate commerce and possessing the same firearm in violation, respectively, of 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1202(a)(1). The Supreme Court held that only one of the convictions could stand because "proof of illegal receipt of a firearm necessarily** includes proof of illegal posession of that weapon." 470 U.S.C. at 862, 105 S.Ct. at 1672. Thus, the sections were "overlapping statutes" which Congress had not"directed to separate evils.' " Id. at 864, 105 S.Ct. at 1673. But the Court quite clearly emphasized that it reached its result because it considered that Congress did not intend both convictions to stand and it was thus carrying out Congressional intent. Id. at 864, 105 S.Ct. at 1673." A-45-46.

The Third Circuit distinguished Ball's applicability to Petitioner's claim that congressional intent and double-jeopardy principles required vacation of his convictions, and not merely his sentence on the lesser-included conspiracy offenses, on two bases. First, the court stated that its decision in United States v. Grayson, 795 F.2d 278, 288 (3d Cir. 1986), cert denied, 479 U.S.

** Emphasis in text.

1054, 107 S.Ct. 927, 93 L.Ed.2d 978 (1987) was deemed controlling, because the court therein had read Ball not to require vacation of convictions , but only the vacatur of the sentence on a lesser included offense vis' a vis' a greater offense.[7./] A-46. Second, the Third Circuit distinguished Ball from the Petitioner's situation sub judice on the grounds of Congressional intent:

> "Unlike the situation in Ball in which discrete statutes were not directed to separate evils, the narcotics conspiracy statutes of whichFernandez was convicted and the continuing criminal enterprise statute have different purposes. While conspiracy statutes punish illegal agreements to import and to distribute and possess cocaine with intent to distribute, the continuing criminal enterprise statute provides for punishment of persons "trafficking in prohibited drugs on a continuing, widespread substantial and supervisory basis. There is simply no indication in the statutes or any legislative history of which we are aware that Congress did not intend to permit separate convictions to stand for the conspiracy and continuing criminal enterprise offenses. A-46.

Noting that the "double jeopardy clause" serves three primary purposes [, i.e.,]:It protects against a second prosecution for the same offense after acquittal. It protects against a second

7./ In Grayson, the defendant was previously convicted of a §846 conspiracy in the united States District Court for the District of Maryland. subsequently, the same defendant was convicted and sentenced for violating the CCE statute in the U.S. District Court for the Eastern District of Pennsylvania. On appeal, the Third Circuit, reading Ball, held that the "sentence" for the CCE offense had to be vacated. However, in an obvious attempt to harmonize Grayson with the "general sentence" rationale of Gomberg, supra; the court in Grayson deleted reference in the actual text of Ball to the word "conviction, and delimited Ball to the proposition that merely the "sentence", contradistinct with the "conviction", need be vacated. Compare, Ball, 470 U.S. 864-866, 105 S.Ct. 1673 with Grayson, id., at 288.

prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense (A-46)." The court, however, went on to state: "None of these values are offended by allowing the [Petitioner's] three convictions to stand inasmuch as only a single punishment, not greater than that allowed by law for the most serious offense, was imposed following a single trial."Id. The third Circuit acknowledged that, under its general sentence formula, "it is possible that there may be collateral consequences from the entry of judgements of conviction on all three counts [; however, the court expressed that Petitioner] need not be shielded [from these consequences] by double jeopardy principles as Congress intended that predicate conspiracy and continuing criminal enterprise convictions may stand:

> While the Supreme Court in Ball was also concerned with collateral consequences and pointed out that the conviction itself could have adverse effects, this was in the context of its conclusion that Congress did not intend both convictions to stand. Ball v. United States, 470 U.S. at 864-65, 105 S.Ct. at 1673. (A-47).

The court also acknowledged that it "realize[d] it [was] possible to combine the convictions themselves without vacating those on the lesser counts and then impose a single sentence. See, United States v. Aiello, 771 F.2d 621, 632-35 (2d Cir. 1985)."[8./] But in explicating its rationale for finding no need to deviate from its preference for "general sentences" vis' a vis' "combined" or "vacated" lesser included offense convictions: the court stated:

8./ The Third Circuit stated that the "Aiello court that [its sentencing procedure] necessary so that the defendant does not suffer from collateral consequences from having the judgement of conviction on the lesser count remain." A-47.

> "We, however, do not understand why, if Congress intended both convictions to stand, that we should be concerned with the collateral consequences of the conviction for the lesser offense . A-46.

Finally, the Third Circuit explicitly recognized that its decision in the Petitioner's case conflicted diametrically with a recent decision of the United States Court of Appeals for the Ninth Circuit -- a case that explicitly supported the Petitioner's urging for vacatur of the lesser included convictions and sentences:

> "We recognize that the Court of Appeals for the Ninth Circuit in United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582 (9th Cir.), cert denied, __U.S.__, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990), also has reached a result different than Gomberg and different from Aiello as well. The court indicated that "[i]t is clear from Jeffers [,supra] that Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation. The remedy required is for the district court to vacate the convictions under Counts One and Two for the conspiracies in violation of section 846." 886 F.2d at 1582. " " A-47.

In discounting the Ninth Circuit's result reasoning and result in Hernandez-Escarsega as being less than persuasive; the Third Circuit opined:

> "We do not understand why the second sentence follows from the first. It there is only one sentence and it is within the statutory limits for punishment for the more serious offense then there is not a cumulative punishment. It seems to us that the remedy afforded the defendant in Hernandez-Escarsega frustrates the Congressional intent and is surely not required by the double jeopardy clause [("The Hernandez-Escarsega court thought that Ball "required vacation of the convictions. 886 F.2d at 1582 n. 14. For the reasons we have already explained, we do not, Fernandez II, n. 3")] A-48)."

Accordingly, the court affirmed the judgement of the district court (A-48). Proceeding pro se, Petitioenr applied for and was granted the opportunity for a 30 day enlargement of time within which to assert, in his own inartful way, why certiorari

review should obtain in this case. See, A-49. This petition for certiorari now follows.

REASONS WHY CERTIORARI REVIEW IS THOUGHT TO BE WARRANTED AND IMPERATIVE

From the outset, it seems worthy to note that certiorari review in this case would afford the Court an excellent opportunity to resolve a sharp conflict extant between the various United States Courts of Appeal, as to just what treatment lesser-included conspiracy convictions should receive in relationship to conviction and sentencing upon the CCE deemed greater-offense. Relying upon the plurality opinion in Jeffers v. United States, supra, as well as (in many cases) the supportive and approving view of reasoning of Jeffers germane to the case sub judice in Garrett v. United States, Garrett v. United States, 471 U.S. 773, 794, 105 S.Ct. 2407, 85 L.Ed.2d (1985); every United States Court of Appeals, with the only current exception being the Seventh Circuit,[9./] has held that narcotics conspiracy violations are lesser-included offenses of the CCE offense proscribed by 21 U.S.C. § 848. See, United States v. Smith, 703 F.2d 627, 628 (D.C. Cir.1983)(per curiam);United States v. Benevento, 836 F.2d 60, 73 (2nd Cir. 1987); United States v. Aguilar, 849 F.2d 92, 98 & n. 11 (collecting cases)(3rd Cir. 1988); United States v. Raimondi, 721 F.2d 476, 477 (4th Cir. 1983(per curiam), cert denied, sub nom, Bello v. United States, 469 U.S. 837, 105 S.Ct 133, 83 L.Ed.2d 74 (1984); United States v. Michel, 588 F.2d 986, 1001

9./ The absence of en banc review in the Seventh Circuit has permitted various panel's within the Seventh Circuit to sail pass a congruent view on this question like ships in the night. In United States v. Jefferson, 714 F.2d 689, 703-706 (7th Cir. 1983) and

(5th Cir.), cert denied, 475 U.S. 1021, 106 S.Ct. 1210, 89 L.Ed.2d 322 (1986);United States v. Shuster, 796 F.2d 337, 341 (6th Cir. 1985), cert denied, 475 U.S. 1021, 106 S.Ct. 1210, 89 L.Ed.2d 322 (1986); United States v. Jefferson, 714 F.2d 689, 705 (7th Cir. 1983), vacated and remanded, 474 U.S. 806, 106 S.Ct. 41, 88 L.Ed.2d 34 (1985); United States v. Grubbs, 829 F.2d 18, 19 (8th Cir. 1987)(per curiam); United States v. Burt, 765 F.2d 1364, 1368 (9th Cir. 1985);United States v. Stallings, 810 F.2d 973, 974-75 (10th Cir. 1987); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986), cert denied, ___U.S.___, 107 S.Ct. 1631, 95 L.Ed.2d, and sub nom, Thomas v. United States, __U.S.__, 107 S.Ct. 3215, 96 L.Ed.2d 702 (1987); accord, 8A Moore & M. Waxner, Moore's Federa; Practice, para. 2908[3], at 29-65 (Mar. 1988 rev.); United States v. Grayson, 795 F.2d 278, 284 (3rd Cir. 1986), cert. denied, 107 S.Ct. 1899:("the [CCE] statute requires an agreement in a design or plan as well as concerted activity, citing Jeffers, supra at 432 U.S. 148-49). Notwithstanding this powerfully harmonious accord of the Circuit Courts of Appeals

n.9 continued/ United States v. Peters, 791 F.2d 1270, 1288 n.22 (7th Cir.), cert. denied, 479 U.S. 847, 107 S.Ct. 168, 93 L.Ed.2d 106 (1986); the Seventh Circuit squarely held, in conformity with the majority view, that narcotics conspiracies were lesser-included offenses of the CCE offense, and which should not be conjoined in or with a sentence for the § 848 greater offense. However, along came United States v. Bond, 847 F.2d 1233 (7th Cir. 1988),which held that "a court may impose concurrent sentences for a §848 conspiracy and the CCE offense."Id. at 1239. The commentary on the advent of Bond vis' a vis' United States v. Jefferson, supra by a panel of the Seventh Circuit in United States v. Moya-Gomez, 860F.2d 706, 754 (7th Cir. 1988) is illuminating [viz.,]: "While the [Bond] panel did not cite the previous holding in Jefferson [,supra] and did not circulate the opinion to the netire court, the effect of the holding in Bond was to overrule the court's previous holding in Jefferson. We cannot ignore the existence of Bond. Under the doctrine of stare decisis, we are constrained to apply its holding here. Therefore, we must conclude that, under the prevailing precendent in this circuit, we cannot afford Celestino relief in this regard." See, also, United States v. Alvarez, 860 F.2d 801, 830-831 & n.31 (7th Cir. 1988). Hence, this case would permit the Court to galvanize the Circuits, and alleviate yet another conflict in opinion.

(with noted exception) with this Court's observations regarding the lesser-included nature of a conspiracy crime with a CCE offense (and with themselves as well);a sharp and manifold divergence of opinion has developed in the Circuits as to whether the proper treatment of the deemed lesser-included offense conspiracies -- with respect to the commands of the double jeopardy clause and Congressional intent -- requires the sentencing court (1) to vacate the lesser included conspiracy convictions and sentence,[10./] (2) merely vacate the sentence, but leave instated the conviction of the greater offense (if the lesser-included conspiracy antedated the CCE crime),[11./] (3) vacate the lesser included sentences, but combine the lesser-included convictions with the greater offense, and then impose a "general sentence" upon the greater offense ,[12./] (4)vacate the lesser included sentences for conspiracy and the greater CCE, and then reimpose a general sentence not exceeding the maximum sentence available for the CCE crime upon the greater and lesser included conspiracy and CCE convictions,[13./] or (5) impose a concurrent sentence for the lesser included conspiracy convictions.[14./]

10./ The majority of the Circuit Courts of Appeals have opted for this approach. See, United States v. Possick, 849 F.2d 332, 341 (8th Cir. 1988); United States v. Stallings, 810 F.2d 973, 975-76 (10th Cir. 1987); United States v. Maull, 806 F.2d 1340, 1346 (8th Cir. 1986), cert denied 480 U.S. 907 (1987); United States v. Shuster, 769 F.2d 337, 343-45 (6th Cir. 1985), cert. denied, 475 U.S. 1021(1986);United States v. Bascaro, 742 F.2d 1335, 1357-58 (11th Cir. 1984), cert denied, 472 U.S. 1017 (1985); United States v. Oberski, 734 F.2d 1030, 1032 (5th Cir.1984), cert denied, 469 U.S. 1113 (1985); United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983)(per curiam); United States v. Graziano, 710 F.2d 691, 699 (11th Cir. 1983); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582 (9th Cir.), cert denied, 110 S.Ct. 3237 (1990); United States v. Cruz, 805 F.2d 1464 (11th Cir. 1986).

11./ United States v. Grayson, 795 F.2d 278, 287-288(3rd Cir. 1986).

12./ United States v.Osorio Estrada, 751 F.2d 128, 134-35 (2d Cir. 1984), modified on reh'g on other grounds, 757 F.2d 27 (2d Cir. 1985); United States v. Aiello, 771 F.2d 621, 632-634 (2nd Cir. 1985).

Proverbially, variety may well be the spice of life; but against the tenor of the constitutional command against multiplicity of punishment for the same offense, the currently divergent opinions of the United States Courts of appeals, in terms of what Congressional intent and constitutional command require in sentencing with respect to a CCE offense and lesser-included conspiracies thereof, is fundementally in discord with the very heartbeat of American jurisprudence: EQUAL JUSTICE FOR ALL UNDER LAW.** Only the voice of the Supreme Court of the United States can transform this disturbing conflict of opinion into harmonous accord. Hence, the Court should avail itself of the vehicle this case presents to quell the tempest, by clarifying what the Constitution and Congress here require.

13./ This was the approach followed by the Third Circuit sub judice (cf., A-45-46). See, also, United States v. Gomberg, 715 F.2d 843, 851-52 (3rd Cir. 1983), cert denied, 465 U.S. 1078 (1984).

14./ United States v. Bond, 847 F.2d 1233, 1239-40 (7th Cir. 1988). (The court in Bond reasoned that concurrent sentences were intended by congress for CCE and conspiracies, because conspiracy was not a lesser incldued offense. cf., n.9, supra).

** In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Court stated: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly." Cf., also Id. at n. 2 (quoting Judge simon E. Sobeloff when Solicitor General in an address before the Judicial Conference on June 29, 1954).

Another compelling reason for the grant of certiorari review in this case, is that the judgement of the Third Circuit sub judice, conflicts diametrically with this Court's reasoning in Jeffers and holding in Ball. With respect to conflicting with the reasoning of the Court in Jeffers; the Third Circuit deemed it appropiate to maintain the lesser-included conspiracy convictions in conjunction with the greater-offense CCE conviction, because --

> "There is simply no indication in the statutes or any legislative history of which we are aware that Congress did not intend to permit separate convictions to stand for the conspiracy and continuing criminal enterprise offense. 916 F.2d at 127 (A-46). 15./

In Jeffers, the plurality opinion read the CCE statute to subsume the crime of conspiracy as one of its elements: "Clearly . . . a conviction [for §848] would be impossible unless concerted activity were present," Id. at 432 U.S. 148, and n. 14: ("The actual language of the [CCE] bill, however, used the words "in concert with" to cover both concerted action and agreement". . . Since the word "concert" commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandomed").16./

15./ The Third Circuit's approach to the CCE statute and underlying legislative history, i.e., "There is simply no indication in the statutes or any legislative history of which we are aware that Congress did not intend to permit separate convictions (A-46), conflicts with the analytical approach prescribed by this Court in discerning whether Congress intended cummulative punishments vel non. Where Congress has not clearly explicated an intent for cummulative punishments, the Court has "presumed" that there is no such intent. See, e.g., Whalen v. United States, 445 U.S. 684, 691-92 (1980);Missouri v. Hunter, 459 U.S. 359, 367 (1983)("the result in Whalen [invalidating cummulative sentences for thecrimes of rape and killing the same victim in the perpetration of the rape] turned on the fact the Court saw no 'clear indication of contrary legislative intent' ")(quoting Whalen, 445 U.S. at 692).

With respect to conflict with the reasoning and holding in Ball, supra; the Third Circuit concluded that Ball was inapposite the scenario sub judice, because:

> "While the Supreme Court in Ball was also concerned with collateral consequences and pointed out and pointed out that the conviction itself could have adverse effects, this was in thecontext of its conclusion that Congress did not intend both convictions to stand . . . We, however, do not understand why, if Congress intended both convictions to stand, that we should be concerned with the collateral consequences of the conviction for the lesser offense (A-47)."

The essential flaw in the Third Circuit's reasoning, in thisrespect, inherently resides in its conception of "punishment."[17./] The Third Circuit, sub judice, reasoned that "[i]f there is only one sentence [upon multiple convictions for the greater and lesser-included offenses,] and it is is within the statutory limits for punishment for the more serious offense [,] then there is not a cumulative punishment (A-48)". This view is irreconcilable with the reasoning and holding of Ball. Ball teaches clearly that where it is determined that Congress has not authorized cumulative punishments for both thegreater offense conduct, and the lesser-included offense conduct subsumed therein, "the only remedy

16./ In the fourteen years since the Jeffers plurality extended the invitation to Congress to reject its reasoning by articulating a different intention other than that discerned by the Court -- and though Congress has amended the CCE statute during this 14 year period -- no countervailing expression of Congressional intent, or repudiation of the plurality's reasoning concerning the realtionship extant between §848 and narcotics conspiracy crimes, has been forthcomming.

17./ The Court in Ball explicitly stated that "the second conviction, even if it results in no greater sentence, is an impermisible punishment, id. at 470 U.S. 865, 105 S.Ct. 1673.

consistent with the congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. . . One of the convictions, as well as its concurrent sentence, is an unauthorized punishment for a separate offense." Id.at 470 U.S. 864,105 S.Ct. 1673. Manifestly, the Third Circuit -- as well as its sister Circuit Courts of Appeals who share its view that lesser-included convictions can coexist with a greater offense conviction as long as there is no separate sentence on the lesser-included offenses -- has misapprehended the import of the Court's admonition in Ball:

> "Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component (citations ommitted)." Id. at 470 U.S. 861, 105 S.Ct. 1672.

Finally, certiorari review should obtain in this case that Petitioner might vindicate his right to be relieved of punishment -- punishment which not only conflicts with congressional intent qua Jeffers and Ball, but coveally so with the double jeopardy jurisprudence of this Court as well. The Court should not disdain to use the instant case as a vehicle to clarify the law in this important domain out of concern for the fact that the case comes from a collateral proceeding vis' a vis' direct appeal. This is true for at least three reasons that occur to the unlettered understanding of the Petitioenr at bar. First, the case does not require the Court to announce a new rule that either represents a clean break with past precedent, or which would culiminate in the need for re-trials in other cases where convictions have become final. To the contrary; Petitioner depends heavily on the precedent of this

Court in his quest for an affirmative rule. Indeed, Petitioner argues unto the Court, respectfully, that the holding he would seek (assuming certiorari review were granted) is actually compelled by the prior decisions of the Court in this area of the law. Furthermore, the rule that the Petitioner seeks is as old as the double jeopardy clause itself: that cumulative punishment for the same offence is impermissible. Second, the Court has supervisory power to compel appropiate attention of the lower federal courts to its precedent. Cf. Supreme Court Rule 10.1(a) & (c). If the Court ruled affirmatively in the favor of the Petitioner, no interest in finality of judgement that is determined to contravene congressional intent could outweigh the policy interest in insuring that punishment does not exceed the boundaries demarcated by Congress and the double jeopardy clause of the Constitution. Third and finally, a favorable rule for the Petitioner here would devolve, by expressed Congressional intent, to any affected federal defendant, regardless of whether his conviction was in repose; because Congress has declared that an illegal sentence may be corrected "at any time". See, Fed. Rule of Criminal Procedure 35(a). There simply is no reason that the federal sentencing law should be permitted to continue in the convolution this Petition depicts. May it please this Court: now is the time to act to arrest the divergent tide of appellate opinions in this domain, and for this Court to speak authoritatively to clarify just whether the judgement of the Third Circuit is correct and in accord with the views of this Court vel non.

I. WHEN FEDERAL NARCOTICS CONSPIRACY VIOLATIONS ARE DEEMED LESSER INCLUDED OFFENSES OF A 21 U.S.C. § 848"CONTINUING CRIMINAL ENTERPRISE OFFENSE (CCE);" THE CONTINUED MAINTENANCE OF THE LESSER-INCLUDED CONSPIRACY 'CONVICTIONS" IN CONJUNCTION WITH THE GREATER CCE OFFENSE, AND UNDER THE RUBRIC OF A "GENERAL SENTENCE", CONSTITUTES CUMULATIVE PUNISHMENT IN DEROGATION OF CONGRESSIONAL INTENT AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

It is beyond peradventure that the "Double Jeopardy Clause [of the Fifth Amendment to the United States Constitution] protects against . . . multiple punishments for the same offense." Brown v. Ohio , 432 U.S. at 165 (quoting North Carolina v. Pearce, 395 U.S. 771, 717 (1969)(Footnotes ommitted). Equally as clear, is that the lower federal courts have held narcotics conspiracies -- whether the import drugs, or to possess them with an intent to distribute the same -- are lesser included offenses of a CCE offense. cf., supra, pgs. 15-16 (collecting cases). In so doing, most of the Federal Courts of Appeals have derived their respective holdings from the reasoning of this Court in Jeffers v. United States, supra. Jeffers, of course, was a plurality opinion. There, the Four Justice plurality assumed arguendo that a 21 U.S.C. § 846 narcotics conspiracy was a lesser included offense of the CCE crime.[18./] 432 U.S. at 149-50. "Unlike a typical judicial assumption **arguendo**, however, this one was based on a detailed rationale,including

18./ Remarkably, Four dissenting Justices in Jeffers would have held that a narcotics conspiracy offense was a lesser-included offense of the CCE crime. 432 U.S. at 158-59 & n. 5.

a close reading of the two statutes in question and a survey of the relevant legislative history underlying the CCE provision. In addition, various passages within Justice Blackmum's plurality opinion indicate that this assumption was not made in passing or ill-considered. Finally, Justice Blackmum explicitly noted that, while his opinion for the plurality left the question open, the opinion filed by four other Justices was "based on the premise that it was beyond dispute that §§ 846 and 848 were . . . related [as lesser-included to greater-inclusive offenses]." United States v. Aguliar, 849 F.2d at 98. As such, it is hardly suprising that, in addition to the Federal Courts of Appeals, this Court has come to endorse the central premise of Jeffers, i.e., that a narcotics conspiracy offense, contradistinct with a substantive narcotics offense, is a lesser included offense of a CCE crime:

> "In Jeffers, a plurality of this Court stated that §848 "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970." The focus of the analysis in Jeffers was the permissibility of cumulative punishments for conspiracy under § 846 and for the CCE under § 848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties. . ." Garrett v. United States, 471 U.S. 773, 794 (1985). 19./

Undeterred by these caveats in Jeffers and Garrett, the Third Circuit has contravened the mandate of the double jeopardy

19./ Both of the Petitioner's conspiracy crimes derive from "other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (and companion Drug Import Act)".

clause by "pyramiding penalties" for the CCE offense, by allowing the lesser-included conspiracy convictions to stand alongside the CEE conviction, and then imposing a "general sentence" upon this multiplicity of convictions. Cf., A-45. This , the court did, upon the assumption that the absence of congressional intent **against** this sentencing protoccol translated somehow into congressional intent **for** this practice (A-46-47). This is plainly wrong! Cf. n.15. Ball, supra could not have made it plainer that a lesser-included "conviction" itself is unauthorized punishment:

> "For purposes of applying the Blockburger test in this setting as a means of ascertaining congressional intent, "punishment" must be the equivalent of criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing component." Id. at 470 U.S. 861-62, 105 S.Ct. 1671-72.

Your Honorable Court, in Ball, did not content itself to rest its holding that vacatur of the lesser-included conviction and sentence was imperative, upon the above quoted precept. Rather, the Court expounded further that:

> "The separate **conviction**, apart from the concurrent sentence, has potential adverse consequences that may not be ignored." Id. at 864-65, 105 S.Ct. 1673. 20./

But the third Circuit has done just that: it has ignored the reality and implication of the fact that the lesser

20./ An excellent discussion of various examples of unintended collateral adverse consequences of permitting lesser-included convictions to remain alongside a greater-offense, is set forth in United States v. Mendoza, 902 F.2d 693, 697-698 (8th cir. 1990).

-included conspiracy convictions **both**, in addendum to the CCE CONVICTION, entail special assessments of $50 which are mandatory as long as the conviction exists, as provided by Title 18 U.S.C. §3013. See, Ray v. United States, 481 U.S. 736 (1987). Cf. A-14 (indicating special assessments have been imposed). Surely these convictions and the corollary imposition of special assessments, constitutes unauthorized, cummulative, punishment. In United States v. Mendoza, supra, 902 F.2d at 698, the Eighth aptly, in the unlettered view of this Petitioner, expounded the correct rule:

> "In United States v. Maull, 806 F.d 1340 (8th Cir.1986), cert denied 480 U.S. 907, 107 S.Ct. 1352, 94 L.Ed.2d 522 (1987), this circuit followed the holding in Ball and ruled that a defendant could not be convicted of and sentenced for both conspiring to distribute cocaine under 18 U.S.C. § 846, and engaging in a continuing criminal enterprise under 18 U.S.C. § 848 . . . Under the sentencing guidelines, Mendoza is not eligible for parole. P.L. 98-473 § 218(a), 98 Stat. 2027 (repealing 18 U.S.C. §§ 4161 et seq., governing parole). Further, if in thefuture Mendoza commits a federal offense, the guidelines provide that his criminal history will be calculated on prior sentences, and not on the number of underlying convictions. . .Mendoza's multiple convictions still have potential adverse consequences. they may be taken into account under state recidivist statutes in the event Mendoza violates state criminal law. Benton v. Maryland, 395 U.S. 784, 789 (1969). As the Supreme Court observed in Ball, the multiple convictions may be used to impeach him, and they carry social stigma. The court also notes that, based on his his second conviction under § 841(a)(1), Mendoza has been required to pay an additional assessment 21./ of fifty dollars under 18 U.S.C. § 3013. The court therefore concludes that the two separate convictions . . . are not mere surplusage, but may constitute cumulative punishment."

21./ The mandatory requirements of 18 U.S.C. § 3013 underscore the need for close attention to the potential for congressionally unintended punishment to transpire in the wake of efforts to preserve convictions for lesser-included offenses. 18 U.S.C § 3013 compels that lesser-included convictions be vacated, if congressionally unintended punishment is to be circumvented as required by the double jeopardy clause.

"The critical inquiry is whether Congress intended to punish each statutory violation separately,Jeffers, Id at 432 U.S. 155 (citations ommitted). . .If some possibility exists that the two statutory offenses are the "same offense" for purposes of double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." Id. Cf., also, Id. at n. 25(citing United States v. Gaddis, 424 U.S. 544, 549 n. 12 (1976((vacating convictions and sentences under 18 U.S.C. §2113(a) in light of conviction under §2113(d)).

> "The Fifth Amendment gurantee against double jeopardy embodies . . . the basic principle that within our federal constitutional framework the legislative power to define criminal offenses and to prescribe punishments to be imposed upon them, resides wholly withthe Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." Whalen v. United States, 445 U.S. 684, 689 (1980).

Sub judice, the tresspass against both congressional intent and constitutional command, evolves mainly from the lower court's assignment of greater importance to a concern for ensuring the Petitioner does not obtain a wind-fall from a possibly succesful collateral attack on the CCE offense in thefuture, contradistinct with the present reality of unauthorized cumulative punishment. The salient point the Third Circuit overlooks, however, is this: by cancelling permanently the lesser-included conviction, while permitting the greater-offense conviction to stand alone, no

undeserved wind-fall devolves to the favor of the Petitioner; because the present reality of a greater-offense conviction vindicates completely the Congressional concern for punishment that it has legislatively authorized to be imposed. To demonstrate the truth of thisproposition another way; may it please the Court to consider this scenario: If the lesser included conspiracy charges resulted in convictions in a separate prosecution prior to the greater CCE offense -- and the CCE offense was coterminous (as here) with the conspiracies -- the double jeopardy Clause would prohibit absolutely any punishment being imposed for the greater offense, even though the prosecution may be completely able to factually prove the defendant's guilt.Cf., Brown v. Ohio, supra. Similarly, when the Court determined in Ball and Gaddis that the vacatur of the convictions on the separate but similar offense convictions were imperative; no undeserved wind-fall obtained to the favor of the accused in those cases, because the congressional interest in punishment was fully vindicated by the present existence of the remaining offense conviction -- whether similar or greater and nature -- which incorporated in and of itself all punishment theCongress of the United States desired be imposed for the same offense. It is a familiar principle that Congress is primarily a lawyers body, and the elected representatives therein are presumed to know what the law is. Hence, if the pen of the National Govermment is to be moved to write into the law a concern for a safety-net of punishment, in the contingent event the greater offense conviction is vacated: the double jeopardy clause, as well as principles of separation of powers, commands that that principle be enshrined into the law by Congress, and not the federal courts.

CONCLUSION

It is prayed that the Court will herein exercise its discretion to review the judgement of the United States Court of Appeals for the Third Circuit, by granting this Petition for a Writ of Certiorari, and appointing learned counsel to brief and argue the merits of the Petitioner's case.

Respectfully submitted,

CARLOS EDUARDO FERNANDEZ,
Federal Register No. 22871-004
United States Penitentiary
P.O. Box 1000
Lewisburg, Pennsylvania 17837

February 13, 1991.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUCARDO FERNANDEZ -

PETITIONER PRO SE

v.

UNITED STATES OF AMERICA -

RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under the pains and penalties of perjury, pursuant to Title 28 U.S.C. § 1746, that the mailing of the foregoing: PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, APPLICATION TO PROCEED INFORMA PAUPERIS AND UNSWORN DECLARATION UNDER PAINS AND PENALTIES OF PERJURY PURSUANT TO 28 U.S.C.§ 1746, and PRO SE APPENDIX, were all placed within the Internal Prison Mailing System on this 14th day of February, 1991, with First Class Mail Postage affixed and pre-paid, as required by and in accordance with, Supreme Court Rule 29.2, and that these materials were properly addressed to the Clerk of Supreme Court and the Solicitor General of the United States - U.S. Department of Justice, Washington, D.C. 20530, Counsel for the Respondent United States of America.

Respectfully submitted,

CARLOS EDUARDO FERNANDEZ,
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United States Penitentiary
P.O. Box 1000
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Petitioner Pro Se

No. 90-7210

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUARDO FERNANDEZ -

PETITIONER PRO SE

v.

UNITED STATES OF AMERICA -

RESPONDENT

PRO SE APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

CARLOS EDUARDO FERNANDEZ,
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TABLE OF CONTENTS

APPENDIX A: PAGE NUMBER(S)

PETITIONER'S MOTION PURSUANT TO FED. RULE. CRIM. P. 35(a) TO TRIKE THE CONVICTIONS AND SENTENCES IMPOSED ON COUNT ONE AND COUNT TWO.....A-1 - A-6

JANUARY 19, 1990 LETTER-RESPONSE FROM THE GOVERNMENT TO THE PETITIONER'S MOTION.....A-7 - A-9

PETITIONER'S REPLY TO THE GOVERNMENT'S JANUARY 19, 1991.....A-10 - A-12

DISTRICT COURT OPINION DATED MARCH 9, 1990....A-13 - A-16

MAY 14, 1990 TRANSCRIPT OF PETITIONER'S RESENTENCING PROCEEDING IN THE DISTRICT COURT.A-17- A-37

JUNE 30, 1987 OPINION OF THE THIRD CIRCUIT AFFIRMING THE PETITIONER'S CONVICTION ON DIRECT APPEAL.....A-38 - A-43

OCTOBER 18, 1990 OPINION OF THE THIRD CIRCUIT AFFIRMING THE DISTRICT COURT'S MAY 14, 1990 ORDER IMPOSING A GENERAL SENTENCE ON CONVICTIONS FOR THE CCE AND CONSPIRACY OFFENSES.....A-44 - A-48

JANUARY 14, 1991 ORDER OF THE HONORABLE, MR. JUSTICE DAVID H. SOUTER, GRANTING THE PETITIOENR'S MOTION FOR A 30 DAY ENLARGEMENT OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO AND INCLUDING FEBRUARY 15, 1991.....A-49

APPENDIX B:

ORIGINAL JUDGEMENT AND COMMITTMENT FORM.....B-1

RESENTENCING ORDER OF THE DISTRICT COURT.....B-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. CARLOS EDUARDO FERNANDEZ, Defendant.	Criminal No. 85-86

MOTION TO STRIKE THE CONVICTIONS AND SENTENCES IMPOSED AS TO COUNT ONE AND COUNT TWO

COMES HERE NOW CARLOS EDUARDO FERNANDEZ, pro se, defendant in this instant case and cause of action, pursuant to Rule 35(a), Federal Rules of Criminal Procedure,[1/] 28 U.S.C. §1651(a) and 28 U.S.C. §2201(a), and hereby moves this Court, for good cause, to strike the convictions and sentences imposed as to Count One and Count Two of the Indictment against the defendant. Defendant Fernandez avers that he is entitled to the relief sought as a matter of law.

In further support of his motion, defendant Fernandez represents as follows:

1./ Effective November 1, 1987, Rule 35, Federal Rules of Criminal Procedure, was amended. See Sentencing Reform Act of 1984, P.L. No. 98-473. However, Rule 35, F.R.Crim.P., pursuant to its provisions prior to its amendment, remains in effect in its application to defendant Fernandez, as a matter of law

1. On December 19, 1985, following a trial by jury on a Twenty-nine (29) Count Indictment, defendant Fernandez was found guilty of engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. §848 (Count 3), conspiracy to distribute cocaine in violation of 21 U.S.C. §846 (Count 1), conspiracy to import cocaine in violation of 21 U.S.C. §952(a)(Count 2), and using a communications facility to facilitate narcotics violations in violation of 21 U.S.C. §843(b)(Counts 10, 11, 12, 19 and 27). The jury verdicts here mentioned resulted from defendant Fernandez, along with several other co-defendants, being tried on a twenty-nine (29) Count Indictment charging a narcotics conspiracy and continuing criminal enterprise (CCE) between in and around November 1977 and on or about March 12, 1985.

2. On February 7, 1986, the united States District Court for the District of New Jersey, the Honorable Dickinson R. Debevoise, U.S. District Judge, presiding, sentenced defendant Fernandez as follows:

Count3:	Forty (40) Years Imprisonment and fined $100,000.00;
Count 1:	Twenty (20) Years Imprisonment and fined $100,000.00 to be served concurrent with the sentence imposed on Count 3;
Count 2:	Twenty (20) Years Imprisonment and fined $100,000 to be served consecutively with the term sentence imposed on Count 1 and concurrently with the sentence imposed on Count 3;
Counts 10, 11, 12, 19 and 27:	Four (4) Years Imprisonment on each of the Counts to be served consecutively to each other but concurrently with all the terms of imprisonment imposed on Count 1, 2 and 3.

The total sentence of the Court, imposed as to defendant Fernandez, is Forty (40) Years Imprisonment and a $300,000.00 fine. The Court also imposed special assessment of $50.00 as to each of eight counts for a total of $400.00 in assessments.

3. Defendant Fernandez filed timely notice of appeal from the judgment of conviction and sentences imposed therefor seeking review of this District Court's judgment in the United States Court of Appeals for the Third Circuit. On June 30, 1987, the U.S. Court of Appeals for the Third Circuit, upon consideration of Fernandez' direct appeal, affirmed the judgment of conviction and sentences handed by this District Court. See U.S. v. Fernandez, 822 F.2d 382 (3d Cir. 1987), cert. denied, 108 S.Ct. 450, 98 L.Ed.2d 391, ___U.S.___ (1987).

A timely petition for a writ of certiorari was filed in the Supreme Court and was subsequently denied.

4. Defendant Fernandez is, at the present time, imprisoned thereat the United States Penitentiary, located at Lewisburg, Pennsylvania, where he is serving out the sentence imposed by this United States District Court.

5. In deciding Fernandez' direct appeal, the United States Court of Appeals for the Third Circuit noted that:

> "While there may be problems with the formal terms of the sentence, the matter was not raised before us and in all events it may be presented to the district court. See Fed.R.Crim.P. 35."
> See U.S. v. Fernandez, 822 F.2d at 383 n.2.

A-3 10

6. The law has long recognezed that "conspiracy" is a lesser included offense found in the CCE statute at 21 U.S.C. §848. The United States Court of Appeals for the Third Circuit holds that:

> "We base this decision on two factors: the plain language of the CCE statute and the legislative history thereto, which was set forth and analyzed in some detail by the Jeffers plurality. See 432 U.S. at 148-49 & n.14, 97 S.Ct. at 2214-15 & n.14. These factors make it apparent that the "in concert" and "narcotics felony" elements of a CCE also constitute a conspiracy offense under section 846. For purposes of double jeopardy analysis, in other words, in a case such as Farber's where the same activities were the basis of each crime, conspiracy is a lesser offense included within the greater crime of engaging in a continuing criminal enterprise."
> See U.S. v. Aguilar, 849 F.2d 92 (3d Cir. 1988).

Under U.S. v. Aguilar, supra, applying Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the conspiracy convictions and sentences at Count One and at Count Two of the Indictment against defendant Fernandez, in the instant case, must be stricken, as a matter of law. Although the United States Court of Appeals for the Third Circuit, in Augilar, was decided on the relationship between CCE and conspiracy in the context of 21 U.S.C. §846, the Aguilar rationale was premised on the CCE elements of "in concert" and "narcotics felony" to find lesser included offense existing in the CCE for double jeopardy purposes. On that basis, the conspiracy conviction and sentence handed down and imposed as to Count 2 of the Indictment against defendant Fernandez, in the instant case, would have to be stricken where it charges and convicts and punishes defendant Fernandez for "conspiracy" to violate 21 U.S.C. §952(a).

A-4 11

7. Under U.S. v. Aguilar, supra, the conviction and sentence imposed as to Count 1 of the Indictment in the instant case against defendant Fernandez must be stricken, as a matter of law, notwithstanding this District Court's consideration of the applicability of U.S. v. Aguilar, supra, to the conviction and sentence handed down and imposed as to Count 2 of the Indictment against defendant Fernandez. United States v. Aguilar, supra. See also, U.S. v. Ciancaglini, 858 F.2d 923, 926-27 (3d Cir. 1988).

WHEREFORE, on the basis of the foregoing, defendant Fernandez prays this District Court to grant the instant motion and strike the convictions and sentences imposed as to Count 1 and Count 2 of the Indictment.

I pray for this.

Respectfully submitted,

Carlos Eduardo Fernandez
Defendant pro se
Reg. No. 22871-004
United States Penitentiary
P.O. Box 1000: I-Unit
Lewisburg, PA 17837

Dated: December 19, 1989.

A-5 12

CERTIFICATE OF SERVICE

I, Carlos Eduardo Fernandez, do hereby certify that a true and correct copy of the foregoing Motion To Strike The Convictions and Sentences Imposed As To Count One and Count Two was served on the Government, via 1st Class U.S. Mail, by mailing same to: The United States Attorney for the District of New Jersey, 970 Broad Street, Federal Building, Newark, NJ, 07102, on this 19th day of December, 1989.

/s/
CARLOS EDUARDO FERNANDEZ
P.O. Box 1000
Lewisburg, PA 17837

A-6 13

United States Attorney
District of New Jersey

970 Broad Street, Room 502
Newark, New Jersey 07102

201/621-2700
FTS/645-2700

January 19, 1990

Honorable Dickinson R. Debevoise
United States District Judge
U.S. Post Office & Courthouse
Newark, New Jersey 07102

Re: United States v. Carlos Fernandez
Criminal No. 85-86

Dear Judge Debevoise:

Please accept this letter as the response of the United States to the motion of defendant Carlos Fernandez to strike the convictions and sentences imposed on Counts 1 and 2 of Indictment No. 85-86.

Rule 35(a) of the Federal Rules of Criminal Procedure provides that the District Court "may correct an illegal sentence at any time." In his moving papers, Fernandez alleges that the convictions and sentences on Counts 1 and 2 (for conspiracy to distribute cocaine and conspiracy to import cocaine, respectively) must be vacated because the Court imposed a concurrent 40 year sentence on Count 3 (the continuing criminal enterprise charge "CCE") in violation of the double jeopardy clause. Fernandez alleges that since the conspiracy charges are lesser included offenses of the CCE charge, therefore no sentence may be imposed on him on those two counts.

This analysis is incorrect. In United States v. Jeffers, 432 U.S. 137 (1977) the Supreme Court held that a defendant convicted of both a drug conspiracy charge and a CCE charge may not be fined in excess of the maximum allowed by the CCE statute. In United States v. Aguilar, 849 F.2d 92 (3rd Cir. 1988), the Third Circuit, interpreting Jeffers, held that a drug conspiracy conviction is a lesser included offense of a CCE conviction. Therefore, a defendant may not receive a cumulative sentence based on lesser included offenses. However, other Third Circuit decisions make clear that the conviction on a lesser included offense is not vacated.

Rather, the proper procedure is for the district court to impose a so-called "general sentence" for both the greater and lesser offenses which may not exceed the maximum authorized sentence of the greater offense. In United States v. Gomberg, 715 F.2d 843, 851-852 (3rd Cir. 1983), the Court of Appeals explained:

> In short, we conclude that Congress did not intend a defendant found guilty of a continuing criminal enterprise to be punished as well for conspiracy and substantive predicate offenses. The DiSantis case must therefore be remanded for resentencing.
>
> We are not unmindful of the practical problems that confront district judges in sentencing defendants like DiSantis. In United States v. Gomez, 583 F.2d at 213, we rejected the contention that a trial court should enter judgment of conviction on the most inclusive offense alone, and not on those counts for which cumulative sentences are forbidden. As we pointed out, a defendant might avoid all punishment for his crimes if an appellate court reversed the single conviction on the compound offense but would have upheld the convictions on the less inclusive counts. To avoid that possibility, we directed the district court to impose a general sentence on all counts for a term not exceeding the maximum possible sentence on the count authorizing the greatest penalty. Id. at 216-17. See United States v. Corson, 449 F.2d 544 (3rd Cir. 1971); see also Zant v. Stephens, ___U.S.___, ___ and n.21 103 S.Ct. 2733, 2746 and n. 21, 77 L.Ed.2d 235 (1983).

This procedure was recently affirmed by the Third Circuit in a case involving CCE and conspiracy convictions. See United States v. Grayson, 795 F.2d 278, 287 (3rd. Cir. 1986), cert. denied, 107 S.Ct. 1899 (1987). See also United States v. Torres, 862 F.2d 1025 at 1032 (3rd Cir. 1988) (affirming the use of a general sentence in similar context).

Accordingly, the United States submits that the Court should correct the judgment of conviction by vacating the present individual sentences and imposing a "general sentence" on all counts of Indictment No. 85-86. The United States submits further that the sentence imposed should be identical to the present sentence imposed on Count 3, the CCE count, of 40 years imprisonment and a $100,000 fine. However, as the Third Circuit cases cited in this letter make clear, the Court should not vacate any of the lesser included convictions themselves.

Respectfully submitted,

SAMUEL A. ALITO, JR.
United States Attorney

By: PAUL B. BRICKFIELD
Assistant U.S. Attorney

cc: Carlos Fernandez

A-9 16

FILED

FEB 5 1988

AT 8:30
WILLIAM T. WALSH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

CARLOS EDUARDO FERNANDEZ,

Defendant.

Criminal No. 85-86

DEFENDANT FERNANDEZ' REPLY
TO GOVERNMENT'S LETTER RESPONSE TO MOTION TO STRIKE
THE CONVICTIONS AND SENTENCES IMPOSED AS TO COUNTS 1 AND 2
OF THE INDICTMENT

COMES HERE NOW CARLOS EDUARDO FERNANDEZ, pro se, defendant in this instant case and cause of action, and, having been served with a copy of the government's response to the defendant's motion to strike the convictions and sentences handed down and imposed as to Count One and Count Two of the Indictment in this case, hereby submits the following in reply to said response [hereinafter referred to as the "Government's Letter"]:

1. To the extent that the Government's Letter concedes to the claim that the sentences should be vacated as imposed to Count One and Count Two of the Indictment, the defendant does not oppose this particular position, and thereby prays this Court to enter an appropriate Order vacting the sentences, accordingly.

A-10 17

2. To the extent that the Government's Letter argues that "the Court should not vacate any of the lesser included convictions themselves", Government's Letter, p.3, the defendant opposes this position, as the law of the United States Court of Appeals for the Third Circuit clearly mandates that the "convictions", which constitute lesser included offenses in the offense of conducting a Continuing Criminal Enterprise in violation of 21 U.S.C. §848, must be vacated and set aside. See U.S. v. Aguilar, 849 F.2d 92 (3d Cir. 1988). In Aguilar, the court of Appeals specifically held:

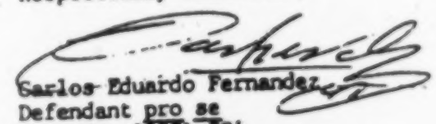
> "...For purposes of double jeopardy analysis, in other words, in a case such as Farber's where the same activities were the basis of each crime, conspiracy is a lesser offense included within the greater crime of engaging in a continuing criminal enterprise....Therefore, because nothing in Garrett or in the legislative materials indicates that Congress meant to permit separate conspiracy and CCE prosecutions of a defendant in Farber's unique circumstances, we conclude "that the principles of finality and prevention of prosecutorial overreaching applied in Brown reach this case."". (citation omitted).
> U.S. v. Aguilar, 849 F.2d at 98-99 (citing Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) and Blockgurger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Accordingly, as a matter of law, this District Court is required to vacate and set aside the convictions, as well as the sentences imposed as to Count One and Count Two of the Indictment, and this Court is further required to dismiss the charges at Count One and Count Two. See U.S. v. Aguilar, 822 F.2d 735, 737 (3d Cir. 1988). It would do well to note that the Government's authorities cited in support of the Government's Letter predate U.S. v. Aguilar, supra.

WHEREFORE, for the foregoing reasons, the defendant prays this Court to grant the motion to strike the convictions and sentences handed down and imposed as to Count One and Count Two of the Indictment and to enter and Order further dismissing said Count One and Count Two of the Indictment. accordingly.

I pray for this.

Respectfully submitted,



Carlos Eduardo Fernandez
Defendant pro se
Reg. No. 22871-004
United States Penitentiary
P.O. Box 1000
Lewisburg, PA 17837

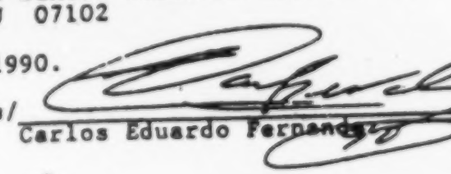
Dated: January 26, 1990.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served on the Government, via 1st Class U.S. Mail, by mailing same to:

Paul B. Brickfield
Assistant U.S. Attorney
Office of the United States Attorney
District of New Jersey
c/o UNITED STATES DISTRICT COURTHOUSE
Newark, NJ 07102

On this 26th day of January, 1990.

/s/ 
Carlos Eduardo Fernandez

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 85-86

UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

CARLOS EDUARDO FERNANDEZ, :

Defendant. :

OPINION

FILED
CLERK, U.S. DISTRICT COURT

DEBEVOISE, District Judge.

On December 19, 1985 after a lengthy jury trial defendant Carlos Eduardo Fernandez was found guilty on the following counts, for which on February 7, 1986 he was sentenced as follows:

Count	Charge	Sentence
1	Conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.	20 years imprisonment to be served concurrently with sentence imposed on Count 3, $100,000 fine.
2	Conspiracy to import cocaine in violation of 21 U.S.C. § 952(a).	20 years imprisonment to be served consecutively to the sentence imposed on Count 1 and concurrently with the sentence imposed on Count 3, $100,000 fine.
3	Engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848.	40 years imprisonment and $100,000 fine.
10, 11, 12, 19, 27	Using a communications facility to facilitate narcotics violations in violation of 21 U.S.C. § 843(b).	4 years imprisonment on each count to be served consecutively to each other but concurrently with the sentences imposed on Counts 1, 2 and 3.

The total sentence was 40 years imprisonment and a $300,000 fine together with an aggregate of $400 in special assessments as mandated by statute.

The convictions were affirmed on appeal and certiorari was denied. United States v. Fernandez, 822 F.2d 382 (3d Cir. 1987), cert. denied, 98 L.Ed.2d 391 (1987). In a footnote in the Third Circuit opinion the Court noted, "While there may be problems with the formal terms of the sentence, the matter was not raised before us and in all events it may be presented to the district court. See Fed.R.Crim.P. 35." 822 F.2d fn. 2 at 383.

Defendant now moves to strike the convictions and sentences imposed on Counts 1 and 2, relying on the holding in United States v. Aguilar, 849 F.2d 92 (3d Cir. 1988) that a prior conviction of a drug conspiracy in violation of 21 U.S.C. § 846 barred on double jeopardy grounds a subsequent continuing criminal enterprise prosecution which included the drug conspiracy as an element of the offense.

We are not involved in the present case with the same situation which existed in Aguilar. Here we do not have successive prosecutions. Rather, we have a single prosecution

A-13 20

A-14 21

involving multiple counts, one of which charges a continuing criminal enterprise, the components of which included the conspiracies and substantive offenses charged in the other counts. In such a situation the court is not called upon to strike the convictions on any of the counts. It is necessary to adhere to the requirements of United States v. Jeffers, 423 U.S. 137 (1977) and ensure that the sentence does not exceed that which may, under the statute, be imposed on the continuing criminal enterprise count.

The Third Circuit specified the mechanism for ensuring an appropriate sentence in United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983). When the continuing criminal enterprise count includes among its elements conspiracy and substantive counts, the sentencing count is directed "to impose a general sentence on all counts for a term not exceeding the maximum possible sentence on the count authorizing the greatest penalty." 715 F.2d at 851, 852.

I did not do that at the time of sentencing in this case and as a result a total fine of $300,000 was imposed on defendant. That is $200,000 more than the maximum fine permitted under § 848. Consequently it will be necessary to resentence defendant in accordance with the requirements set forth in Gomberg. That will be done on March 26, 1990 at 2:00 p.m. If defendant is unable to obtain an attorney he should advise the court and an attorney will be appointed to represent him at the time of resentencing.

The government is requested to submit an appropriate form of order implementing this opinion. It is also requested to make arrangements to have defendant present at the March 26 sentencing.

DATED: March 9, 1990

DICKINSON R. DEBEVOISE
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Criminal No. 85-86

UNITED STATES OF AMERICA, :

TRANSCRIPT OF PROCEEDINGS

v. :

CARLOS FERNANDEZ, :

Defendant. :

- - - - - - - - - - - - - - - -

Newark, New Jersey
May 14, 1990

B E F O R E: HONORABLE DICKINSON R. DEBEVOISE,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SAMUEL A. ALITO, JR., UNITED STATES ATTORNEY
BY: PAUL BRICKFIELD, Assistant U.S. Attorney,
For the Government

MARTIN L. SCHMUCKLER,
Attorney for the Defendant

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

HOWARD A. RAPPAPORT
Official Court Reporter

A-17

THE COURT: All right, next is number 57, United State against Fernandez.

All right, we have two phases of this. We have the matter of the presentencing, of course, but preliminary to that I received a letter from Mr. Fernandez with respect to my March 9th opinion in which I held that the matter should be set down for resentencing and the original sentence vacated.

Mr. Fernandez is still taking the position that Counts 1 and 2 should be dismissed or otherwise dispensed with.

Mr. Fernandez, are you still arguing that position?

MR. FERNANDEZ: Yes, your Honor.

MR. SCHMUCKLER: Yes.

THE COURT: Mr. Schmuckler, are you going to present that position today?

MR. SCHMUCKLER: Yes.

THE COURT: This is a motion for reconsideration of the March 9th opinion.

MR. SCHMUCKLER: Yes, I think that would be appropriate to characterize it that way, Judge.

THE COURT: All right, we'll do that first and then we'll proceed to the resentencing.

Mr. Schmuckler what would you want to say in that regard?

MR. SCHMUCKLER: Your Honor, essentially I'm arguing for the point that while in the Third Circuit they have applied

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the general sentence concept and effectively ignored whether or not there are multiple convictions --

THE COURT: There is nothing wrong with multiple convictions in the same action as far as I can see.

MR. SCHMUCKLER: The Supreme Court has said in United States versus Ball that an unnecessary conviction does amount t a form of punishment. I don't think the government can argue the necessity to preserve the underlying conviction, since it i the general conviction for which a general sentence is to apply which counts. The Court is going to exercise its sentencing power through the conviction on the CCE count and not on any underlying count.

THE COURT: But Jeffers dealt with exactly that situation. It had a CCE and it had a drug conspiracy together, and the only concern there was that there not be oversentencing There was no concern that there be two trials or two conviction even though one was incorporated in the other.

MR. SCHMUCKLER: We are past the appellate stage, and there is no longer any question as to possible sufficiency of the CCE general verdict. So therefore that kind of reasoning would really no longer apply. This Court can safely vacate those convictions without concerning or destroying the underpinnings of the CCE conviction.

Since in this case no one says the unnecessary underlying convictions do amount to a form of punishment, there

really is no need to preserve them.

THE COURT: All right. Let me put a brief opinion on the record directed to that issue.

MR. SCHMUCKLER: I should point out the Ninth Circuit addressing exactly that issue in United States versus Escarcega which I cited in my letter to you. That is precisely what was done.

It relies on the Ball decision which I think your Honor will note was decided one year after Gomberg.

THE COURT: All right, let me just wrap up the opinion in this regard.

In an opinion which was filed on March 9th, 1990 I held that I should not vacate the defendant's convictions on Secti 846 and Section 952(a) conspiracy charges even though they are lesser included offenses and the Section 848 continuing criminal enterprise charges. I held I should impose a general sentence on all counts for a term not exceeding the maximum possible sentence on the CCE count. I relied upon the Third Circuit case of United States v. Gomberg, 715 F. 2d 843 (1983).

After the issuance of my opinion defendant had, in effect, moved for reconsideration asserting that Gomberg had been superseded by the more recent Third Circuit opinion of United States v. Aguillar, 849 F. 2d 92 (3d Cir. 1988).

What defendant has failed to appreciate is that there are two very different situations involved. One is where there

are successive trials for the principal offense and the lesser included offenses, and in that situation double jeopardy principles are applicable. Aguillar dealt with that situation.

The other situation is where the principal offenses and lesser included offenses are tried in the same proceeding. In that situation double jeopardy principles have no bearing, and the question is whether Congress intended to limit the penalties to those imposed for the principal offense. Gomberg dealt with that situation.

Jeffers v. United States, 432 U.S. 137 (1977) recognized that it is proper to try a one case conspiracy and a continuing criminal enterprise indictment. It is simply necessary in the event of conviction on both indictments to insure that an excessive penalty is not imposed.

This principle was applied to the Third Circuit opinion in Gomberg. Double jeopardy principles have three purposes: (i) To protect against a second prosecution for the same offense after acquittal; (ii) To protect against a second prosecution for the same offense after conviction and, (iii) to protect against multiple punishment for the same offense.

Multiple prosecutions are not threatened when a principal offense and lesser included offense are tried at the same time. Multiple punishment is avoided by limiting the punishment to the maximum provided by the principal offense. Aguillar dealt with successive prosecutions. It is significant

for present purposes because it held that a Section 846 drug conspiracy is a lesser offense included within the greater crime of engaging in a Section 848 continuing criminal enterprise. Thus, under Jeffers and Gomberg the total sentence may not be greater than that provided for the CCE offense. However, it provides no support for defendant's contention that his convictions on Section 846 and Section 952(a) conspiracy charges should be vacated. Those convictions were obtained in a single prosecution and trial and there are no double jeopardy implications. Therefore defendant's motion for reconsideration of my March 9, 1990 opinion will be denied.

The government has submitted a form of order. Mr. Schmuckler, you objected to it. I think I can meet your objections simply by crossing out one item there.

The order provides that defendant be returned to court for resentencing, and Mr. Brickfield added, the portion of the sentence relating to the fine.

I'll just put for resentencing, period, and you can argue now whether it should be limited to the portion of the sentence relating to the fine or whether it should extend to the entire sentence.

Mr. Brickfield, I'm going to cross out on the portion of the sentence relating to the fine and just sign the order as otherwise has been submitted.

The order has been signed returning Mr. Fernandez for

resentencing. Mr. Schmuckler, here we are now.

MR. SCHMUCKLER: Your Honor, I regard this order as th most important thing that is available to this defendant in a case which has been characterized by a long history of courtroo warfare, and I think that was all in spite of the best efforts of this Court to conduct the kind of proceedings that would satisfy everyone concerned, justice properly being applied.

This Court has done its best from beginning to end, anc you haven't always had the cooperation of the defense side in this case. That is not all the fault of this defendant. He wa certainly --

THE COURT: Let me say I have no recollection of any criticism of defense efforts.

MR. SCHMUCKLER: I'm not saying that you ever did.

THE COURT: It was a hard fought case and it was a very lengthy case, but my recollection is that there was nothing any defense counsel or any defendant did in the defense of the case which was in any way out of line.

MR. SCHMUCKLER: As far as I'm concerned, Judge, from what I have seen of the record and from what I know of the litigants, your Honor demonstrate the patience of a saint.

THE COURT: Thank you. Very few people say that. I've heard other comments.

MR. SCHMUCKLER: I think you saw a defendant who was extremely immature and who in my opinion -- and I'm sorry that I

32A+

have to say this -- didn't get the kind of advice at the time which would have led to a different result in this case.

He was offered a significant concession by the prosecution before this trial began. Any fair reader of the discovery materials in this case would have told his defense lawyer that this case should not go to trial.

He sat there for long weeks between a co-defendant who perhaps could lay a better claim of innocence than this defendant could lay, and his own lawyer who fought tooth and nail from beginning to end. Yes, it was a hard fought case. It was a needlessly fought case. This defendant was caught up in an endless siege mentality which he lacked neither the education, the intelligence or the maturity to realize.

I told him at the outset of this case that he should be pleading guilty. He didn't get that same advice from the attorneys who were trying this case with him. Whether they felt uncomfortable giving that advice to someone who they felt might not be mature enough to appreciate it, or whether they really believed that there was some semblance of a defense that could result in his exoneration on these charges I don't know.

I do believe that that hard fought case that went on for so long must have steadily impressed the Court that this defendant was absolutely not a candidate for rehabilitation.

Your Honor imposed the kind of sentence which appears to reflect that, because a 40-year sentence, whether one calls

33A-2

it a general sentence or not, is really a very unrelated and more technical issue with a lot less meaning than what we are doing now.

THE COURT: Can you imagine what the sentence would be under the guidelines?

MR. SCHMUCKLER: Probably less.

THE COURT: Oh no -- well, it might be less than that in number of months, but in real time could you imagine what it would be?

MR. SCHMUCKLER: It's true that the available credits for good behavior are drastically reduced.

THE COURT: By about two-thirds.

MR. SCHMUCKLER: The base offense level would have been lower.

THE COURT: When you think of the quantity of the drugs that were involved over that lengthy period of time and the role that Mr. Fernandez played in the operation, it would be staggering, the number of months of mandatory jail time that sentencing guidelines would now impose.

Here 40 years sounds Draconian, and it was a very heavy sentence, but, on the other hand, there is eligibility for consideration for parole at one-third of that time which is absolutely excluded under the guidelines as you know.

MR. SCHMUCKLER: At the moment it is excluded under the CCE count as well. He's not going to have a chance for liberty

unless he earns and receives every one of the potential jail time credits that are theoretically allowable, and at best 27 years from the date of his arrest he could be released. That i an awful long time, Judge.

I doubt that even under the sentencing guidelines, wit the kind of advice that he should have had at that time, and accepting the advice at that time, that there wouldn't be a very, very substantial difference.

I would doubt that this defendant would be looking at sentence that would keep him confined for more than 12, 14 years, and I say that because I have looked at cases similar to this. I've been involved in many cases similar to this, where even under the sentencing guidelines it was possible in a pretrial setting to limit a defendant's exposure, and nobody felt it was giving the courthouse away.

I'm not saying that your Honor leaped to the occasion and threw the book at the defendant because of personal animosity. I just think that this case grew important out of all proportion --

THE COURT: It was a tremendous operation extending over a very long period of time. The basis for the sentence was the enormous drug operation that was being carried out with so many people. So many people were being guided and directed by Mr. Fernandez. He was the leader. Many of them were very small time people.

But just coordinating that effort, and the logistics involved and the geographical areas involved were very, very substantial, probably the largest operation I've ever seen.

MR. SCHMUCKLER: Well, the newspapers are just full of accounts all the time of situations much more dramatic than this.

THE COURT: That's true, since then, since then. But up to that point, in this part of the country, this was a very major operation.

It is true Florida and those areas probably experienced it much earlier, but we hadn't here.

Unfortunately, now we have seen much larger operations than in the past.

MR. SCHMUCKLER: That's one of the reasons why there are sentencing guidelines. Before we had sentencing guidelines we had parole guidelines from which our sentencing guidelines were largely borrowed. It's because what would appear to be a very significant case in one community and one locale and might lead to one sentencing result often led to a different result elsewhere. Norms vary from place to place.

It may well be that it appeared in the District of New Jersey this was a significant matter. There are many other jurisdictions where it wouldn't have been regarded that way.

Indeed, had this defendant done what I would like to have seen him do at the outset of this case, I don't think your

Honor would have felt that way.

THE COURT: But he didn't.

MR. SCHMUCKLER: Every little aspect of the case grew in importance. The government had incentive at every moment of the case to convince the Court and the jury that there was a lot of activity attributable to this defendant, and that had to be their theory from beginning to end to stave off any possibility that reasonable doubt would creep in anywhere.

Of course, once a jury rendered its verdict, he's deemed guilty of almost everything ever said. Mr. Fernandez is not that bad a fella. The real Fernandez I don't think has ever been heard by this Court.

From what I saw in the probation report and the statements at sentence and the statements of his own counsel, that there was nothing to show that there was some contrition.

How could there have been after a battle like that, where the defendant was in daily combat for so long? His good senses left him very early in this case, and it's taken a couple of years in the can for him to gain the kind of maturity that if he had at the time, together with the right kind of advice, would have produced a different outcome.

Certainly it must have struck your Honor as strange that you never saw a Rule 35 application in this case, and I can tell your Honor something about that. With two or three days left of the 120-day period, certainly that's not a problem now

inasmuch as we are in a resentencing proceeding, certainly the Rule 35 opportunity is now available to this defendant, but it must have struck your Honor strange if it was reasonable for your Honor to think about it, perhaps it was just ignored or not thought of, but this defendant having received a sentence like that, there should have been some effort to persuade this Court to reconsider. He didn't even have the ability at the time to do that, and I spoke with him. I was on the phone with him at least five or six times during that period. When it came down to the last couple of days I dictated a letter to him and made him write it down word for word and asked him to send it to you, and he just couldn't bring himself to do it.

Had I been his trial counsel there wouldn't have been a trial. There would have been a guilty plea. And had there been a guilty plea this defendant would have been telling you a different thing than you saw throughout that trial and what you heard at sentencing.

I think this defendant has had plenty of opportunity now to reflect, and inasmuch as this resentencing opportunity came up and he notified me and he asked me if I would stand in for him and help him now, I said to him I would do so, but only on one condition, no more fighting, no more quarreling, no more rejecting the responsibility that you should have recognized that you had. There are plenty of people that suffered including yourself.

I grant your Honor that, yes, there were many, many people involved. There were a lot of people involved that this defendant grew up with and knew all his life and did little things here and there. The one thing that was common to all their involvements was, yes, him, but there were really very few on a day by day made it a lifetime devotion. Even this defendant didn't make it a lifetime devotion, but he was certainly continuously involved for a very, very substantial period of time.

I think there is reason, with the appropriate expressions from this defendant, Judge, of some adjustment of sentence. From what I have seen the way this Court conducted the proceedings, I think this defendant, if presented to you in the proper light, you would have been able to do that and I believe you ought to be able to do that now if you would hear a few words from this defendant.

THE COURT: Yes, Mr. Fernandez, is there something that you would like to say at this time?

MR. FERNANDEZ: Your Honor, the man you see now is not the same man you see during the trial. I'm now completely different man. I change. This change my life completely.

THE COURT: All right, thank you very much.

Mr. Brickfield, is there something that the government wishes to say?

MR. BRICKFIELD: Just briefly, your Honor.

In our letter to the Court we asked the same sentence be imposed, and we do so again today.

I want to address briefly, Mr. Schmuckler raised about the guidelines and what the -- predicting what the sentence would be.

Of course, the guidelines does not apply to this case. But as the Court is aware, the government makes less use of the CCE statute these days because since the time of this trial the drug statutes have been dramatically increased.

For example, a man like Mr. Fernandez was brought to trial today he would have been charged with the kingpin statute, which his activities would clearly have fallen into that area.

As the Court is aware, under the kingpin statute there is no possibility of parole, that lifetime sentences were being handed out.

As the Court will remember, back in 1985 this was an enormous case, not just for New Jersey, but for the United States. This case touched the United States. There was drug dealing in Florida, in New Jersey, New York, Massachusetts, even drug dealing in Alaska. If the Court remembers, cocaine sent from Florida to Elizabeth, New Jersey up to Alaska. There was cocaine in California, 20 kilos of cocaine seized in New Mexico, cocaine seized in Louisiana. Over 72 defendants were arrested when this case came down. Approximately 60 convictions were eventually obtained and approximately ten people remain

A-31

fugitives.

The Court had a very long opportunity throughout the trial to hear about the drug dealing which went on for years, literally years and years. As the Court will recall, the United States at that time asked that a life sentence be imposed on Mr. Fernandez to send a message that a person who runs an operation involving 70 people in many, many states is a major federal offense, and that is what the CCE was designed to address.

Under the sentence imposed Mr. Fernandez will have to do 27, 26 years. He has to serve two-thirds before he's eligible. That is a very stiff sentence. The United States recognizes that. This is one of the few cases that come every five or ten years where in fact a person deserves that sentence.

Mr. Fernandez today, he says he changed, and he sent to our office certificates of courses he has taken in prison, and there is no doubt that probably he has tremendous remorse, tremendous regrets about what went on.

That drug dealing went on for 10 or 12 years. Mr. Fernandez has been in jail less than four years, your Honor, and if he has remorse now, in effect, the purpose of the sentence is working. Mr. Fernandez is being punished. His plight is sending a message since it was a very highly publicized case in this area. It is being sent. Major drug dealing is a major federal offense and should be punished appropriately.

It is our position the Court should reimpose the

A-32

sentence of 40 years and the $100,000 fine.

THE COURT: Yes, Mr. Schmuckler.

MR. SCHMUCKLER: One more thing, Judge.

It might be worth getting a little more evidence of the position that I have taken and what I have said about this defendant, a little more evidence than simply showing your Honor some 50 or 60 certificates that we sent you which demonstrate that very soon the defendant began doing productive things and has done it steadily.

Perhaps the Court considers that some of that is make wait. You don't know what is behind some of those things. It may be some palliative that they utilize in the correction system to keep inmates feeling good about themselves.

There is a procedure available to your Honor which would not strain the probation services here. Your Honor could impose a study and report sentence and let this defendant be brought back after a full-scale institutional evaluation which would tell your Honor a lot more about this defendant the way he is right now than you ever knew before so that you could make a determination as to whether it is appropriate to adjust his sentence.

I'm saying that because I'm not sure that the space of time that we are taking here and the exchange of letters and the submission of certificates you could really do what I think is called for here. I wonder if your Honor would consider doing

that?

THE COURT: No, I'm not going to consider that, and the reason is I think I should sentence as of the time of the original sentencing date.

This is a matter which comes up on motions for reduction of sentence on frequent occasions where a defendant points out that he has done some very fine things in prison, has made great character development, occupational, other developments. That is pertinent to parole, but not the basic sentence itself under ordinary circumstances.

Here it is the same factor. I'm going to sentence on the basis of the facts, the record and the situation as it existed at the time of the original sentence. I'm going to do that, I'm going to impose the same sentence as before, except for the fine.

I am impressed by the work that Mr. Fernandez has done in prison, by the voluntary work he has done with the suicide watch for the religious groups he's affiliated with, the drug programs he has engaged in and completed. And I would be perfectly willing to write to whatever parole or probation authorities you would like me to write to, or to whom it may concern a letter. I take them at face value. I take his statements in the submissions he has made and I take the reports and the certificates from the prison authorities as genuine. I don't see any subterfuge. I see that it is perhaps a very real

change of direction and a recognition of the necessity of bringing it out.

I felt I should not take that into account at the time of resentencing, and I only consider the record as it existed earlier. Had those been in effect at the time of sentencing, something that had happened before sentencing, there would certainly have been matters I would have considered, and I certainly hope that any parole or probation authorities would take them into account in determining if they have any discretion at the time when there should be an ultimate release.

I appreciate the limits set by the CCE, but there may be other areas where discretion is involved, and I would think that it warrants exercising discretion towards an earlier rather than a later release date, but I don't think I should take them into to account in imposing sentence at this time.

Consequently, the formal order on resentencing will be, for the reasons previously set forth in opinions of the Court, the Court hereby vacates the sentence previously imposed on February 7, 1986. On Count 1, 2 and 3 the Court imposes a general sentence wherein the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 40 years, and defendant is also fined the sum of $100,000 on this sentence.

On Counts 10, 11, 12, 19 and 27, the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for a term of four years on each count to be served consecutively to each other, but concurrently with the general sentence imposed on Counts 1, 2 and 3.

Special assessment of $50 is imposed on each of the eight counts for a total of $400.

That will be the determination of the resentencing procedure.

MR. SCHMUCKLER: May I say one more word?

THE COURT: Yes, sure.

MR. SCHMUCKLER: I can understand the Court's desire to impose sentence on what you view as doing what would have been appropriate at the time if you had been able to do it, and I know that the defendant appreciates the many kind remarks and observations that you have made. However, he is not eligible for parole, and the matters that your Honor has set forth on the record are not going to enable him to win any earlier release no matter how hard he applies himself.

He was doing the things that those certificates reflect even at the time he was declining to request consideration under Rule 35. Now that your Honor has resentenced the defendant on each of the original accounts upon which he is properly available for sentence, the Rule 35 procedure is open to him.

In a Rule 35 procedure your Honor is entitled to receive changed circumstances, no matter that they have changed over a period of five years rather than a period of 120 months.

THE COURT: Why don't you bring a Rule 35 proceeding?

MR. SCHMUCKLER: Would your Honor consider -- and I will make this part of a Rule 35 application to you -- reducing the sentence, the non-probeable portion of the sentence under the CCE count and adjusting the four-year count sentences --

THE COURT: Mr. Schmuckler, these are the subject of a Rule 35 motion. I have imposed the sentence here. If he has any further applications it will have to be under Rule 35.

MR. SCHMUCKLER: Very well, your Honor.

THE COURT: All right. Yes. That's good. I appreciate your assisting us and assisting with Mr. Fernandez in these proceedings.

MR. SCHMUCKLER: Thank you, your Honor.

THE COURT: Good. Thank you.

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A-37

46

Second, I believe that the Secretary, instead of suing for damages, may opt to waive the "approved" deferment requirement and appoint the defaulting scholarship recipient to the Corps to begin obligated service. In Dr. Bills' case this option would lead to the following result. By statute the Secretary was *required* to appoint Dr. Bills to the Corps upon completion of his medical school training *unless* he requested a deferment of three years or less.[4] As. Dr. Bills requested n one-year deferment, the Secretary was required to defer his appointment to the Corps until completion of the one year of training (whether or not this training included the primary care rotation). At the end of that deferment, in June of 1981, the Secretary could have appointed Dr. Bills to the Corps to begin his service obligation. I see nothing to preclude the Secretary from appointing Dr. Bills to the Corps at this time and assigning him to a manpower shortage area in accordance with 42 U.S.C. § 254m(d).[5] If following his appointment to the Corps and upon assignment to a manpower shortage area, Dr. Bills "fails to begin or complete" the obligated service, he is then in breach of his contract and treble damages are determined in accordance with 42 U.S.C. § 254o (b)(1).

For the foregoing reasons I respectfully dissent from Part II of the majority's opinion and the affirmance of the award of treble damages.

4. *See* 42 U.S.C. § 254m(b)(3)(A) and (c).

5. Of course, the amount of service which Dr. Bills owes to the program is only one year since the Secretary is statutorily required to accept

UNITED STATES of America

v.

FERNANDEZ, Carlos Eduardo.

Appeal of Carlos Eduardo FERNANDEZ.

No. 86-5139.

United States Court of Appeals, Third Circuit.

Argued Jan. 22, 1987.

Decided June 30, 1987.

Defendant was convicted after jury trial in the United States District Court for the District of New Jersey, at Newark, Dickinson R. Debevoise, J., of participating in conspiracy to import and distribute cocaine, and defendant appealed. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) conspiracy to distribute narcotics may be considered by jury as predicate crime in same indictment and under same set of facts as continuing criminal enterprise charge, and (2) numerosity requirement of continuing criminal enterprise offense does not require that five persons be under defendant's supervision at same moment nor participate in conduct of same underlying felony, but rather, five persons must be under defendant's supervision in conduct of same continuing criminal enterprise.

Judgment affirmed.

1. Drugs and Narcotics ⇐73

Conspiracy to distribute narcotics may be considered by jury as predicate crime in same indictment and under same set of facts as continuing criminal enterprise charge. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

Dr. Bills' service under the National Research Service Award Program. *See* Majority Opinion, Part III.

A-38

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n. *See* Majority Opinion.

2. Drugs and Narcotics ⇐123(4)

There is no requirement that Government prove each element of continuing criminal enterprise offense by distinct and independent proof. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

3. Drugs and Narcotics ⇐73

Numerosity requirement of continuing criminal enterprise offense does not require that five persons be under defendant's supervision at same moment or participate in conduct of same underlying felony, but rather, five persons must be under defendant's supervision in conduct of same continuing criminal enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

4. Drugs and Narcotics ⇐73

Counts charging use of telephone to aid narcotics conspiracy may serve as predicate offenses for continuing criminal enterprise violation. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 403(b), 408, 21 U.S.C.A. §§ 843(b), 848.

5. Criminal Law ⇐27

Use of telephone to facilitate narcotics violation is felony not only when telephone is used to facilitate commission of overt act or substantive crime, but also when telephone is used in furtherance of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 403(b), 21 U.S.C.A. § 843(b).

Herald Price Fahringer (argued), Lipsitz, Green, Fahringer, Poll, Schuller & James, New York City, for appellant.

Louis M. Fischer (argued), Appellate Section, Criminal Division, Washington, D.C., Jero[redacted] A. Ballarotto, Paul B. Brickfield, Asst. U.S. Attys., D.N.J., Thomas W. Greelish, U.S. Atty., D.N.J., Donald J. Fay, Newark, N.J., for appellee.

Before SEITZ, BECKER, and MANSMANN, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This appeal arises from a final judgment of conviction of the appellant Carlos Fernandez for his participation in a conspiracy to import and distribute cocaine. Although Fernandez raises a number of contentions,[1] we are here primarily concerned with his arguments that conspiracies charged in violation of 21 U.S.C. §§ 846 and 963 may not also serve as predicate acts in the same indictment charging a violation of the continuing criminal enterprise statute, 21 U.S.C. § 848 ("CCE"), and his contention that telephone calls in violation of § 843(b) facilitating a § 846 conspiracy may not satisfy the series of violations requirement of § 848. In *United States v. Grayson*, 795 F.2d 278 (3d Cir.1986) *cert. denied*, — U.S. —, 107 S.Ct. 1899, 95 L.Ed.2d 505 (1987), we held that a prior conviction for a conspiracy offense may serve as a predicate act for a CCE offense. We hold now that a § 846 conspiracy may be considered by the jury as a predicate crime in the same indictment and under the same set of facts as a CCE charge under § 848. A violation of § 963 may constitute a predicate offense for a § 848 conviction as well. We hold too that telephone calls in violation of 21 U.S.C. § 843(b), made to facilitate a § 846 conspiracy, may satisfy the series of violations requirement of § 848. Accordingly, we will affirm the judgment of sentence.[2]

1. Fernandez also contends that: 1) he was denied his rights under Fed.R.Crim.P. 43 when he was briefly absent from trial due to a stomach virus, because that absence was not an intentional relinquishment of his right to be present at every portion of the trial, 2) permitting a detective involved in the investigation to testify as an expert on the use of code words by drug dealers deprived him of a fair trial, 3) the government's proofs established multiple conspiracies not subsidiary to the overall conspiracy charged, 4) the court failed to instruct the jurors adequately regarding the absence of co-defendants who pled guilty during trial, and 5) two photographs were erroneously admitted into evidence. We find no merit in any of these contentions.

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A-39

II.

The offense of engaging in a continuing criminal enterprise is established in 21 U.S.C. § 848(a) and is defined in 21 U.S.C. § 848(d).[3] To establish guilt under this statute, the government must prove:

1) a felony violation of the federal narcotics law
2) as part of a continuing series of violations
3) in concert with five or more persons
4) for whom the defendant is an organizer or supervisor
5) from which he derives substantial income or resources.

Grayson, 795 F.2d at 283–84.

The appellant's primary contention is that the district court erred as a matter of law in charging the jury that the narcotics distribution conspiracy (§ 846) charged in Count I of the indictment could serve as the predicate, or felony violation, of the federal narcotics law (number 1 above) to support a conviction under the continuing criminal enterprise statute.

Fernandez argues that a § 848 conviction requires proof of violations "in concert" with five or more others, and is therefore in effect a conspiracy statute. Any proof of the "in concert" requirement would automatically include proof of any conspiracy charged under § 846. Fernandez thus contends that to allow the same conspiracy to satisfy the "in concert" requirement as well as the predicate felony offense would offend the structure and common sense interpretation of the statute. In so doing, the Congressional scheme requiring a series of violations in concert with five or more other persons would, according to Fernandez, be "short-circuited."

The government argues that the plain language of the statute permits the violation of any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony," 21 U.S.C. § 848(b)(1), to be used as a predicate crime for a § 848 conviction. Since a § 846 conviction is a felony violation, the government asserts that it may therefore serve as the underlying offense for a § 848 conviction.

Because resolution of the issues in this case involve the interpretation and application of legal precepts, our standard of review is plenary. *See Grayson*, 795 F.2d 278; *United States v. Adams*, 759 F.2d 1099 (3d Cir.1985), *cert. denied*, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985).

III.

[1] We do not believe that a § 846 conspiracy used as a predicate offense for a § 848 conviction collapses the elements of the CCE statute, nor denigrates the Congressional scheme. Our analysis begins with the language of the statute.

The statute provides, in clear language, that *any* felony violation of Subchapters I and II of Chapter 13 of Title 21 is an eligible predicate. There is no exclusionary or delimiting language as to § 846, § 963, or to any other felony. We note that there is no statutory requirement that to be utilized as a predicate offense, the felony must be the subject of a prior indictment, nor is there any prohibition against the felony being charged in the same indictment. We are therefore compelled to follow the plain statutory language in the absence of a clearly expressed legislative intent to the contrary. *See United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981). We have been unable to discover any legislative history directed to this specific issue,

3. The text reads in relevant part:

> **§ 848. Continuing criminal enterprise**
> (d) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> (B) from which such person obtains substantial income or resources.

A-40

nor have the parties supplied any such references. We, therefore, examine the general purposes of the legislation.

Through the passage of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, Congress clearly intended to create the separate criminal offense of a "continuing criminal enterprise." Described as the "King Pin" Statute, section 848 was aimed at those trafficking in prohibited drugs on a continuing, widespread, substantial and supervisory basis. *See, e.g., United States v. Johnson*, 575 F.2d 1347 (5th Cir.1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979); *United States v. Manfredi*, 488 F.2d 588 (2d Cir.1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974).

House Report No. 91-1444, 91st Cong.2d Sess. reprinted in 1970 U.S.Code Cong. & Admin.News, 4566, 4575-4576, indicates that the primary thrust of the bill was to control the illegal traffic in drugs with the full power of the federal government. Given this general philosophy, the approach of the bill was to provide severe criminal penalties for persons whose illicit manufacture or sale of controlled drugs was primarily for the profits to be derived therefrom. The criminal penalties for the manufacture, distribution or sale of drugs thus varies depending upon the danger of the drug *except* when a continuing criminal enterprise serves as the basis of the indictment. In that circumstance, the danger of the drug is not the basis of the penalty, but rather the inherent danger to society of the activity.

The purpose of § 848 is thus clearly different from other sections of the bill. Section 848 was designed to create the separate criminal offense of a "continuing criminal enterprise," punishable in addition to, and not as a substitute for, the predicate offenses. *See Garrett v. United States*, 471 U.S. 773, 785, 105 S.Ct. 2407, 2415, 85 L.Ed.2d 764 (1985). It is not merely a more grandiose or far-reaching conspiracy statute, as Fernandez' argument appears to suggest. As the Court noted in *Garrett*, "[i]t runs counter to common sense to infer that Congress intended to substitute the CCE offense for the underlying predicate offenses ... rather than to permit prosecution for CCE in addition to prosecution for the predicate offenses.... It would be illogical for Congress to have intended that prosecutors choose between the predicate offenses and the CCE offense in pursuing major drug dealers." *Id.* at 785. The purpose of the statute would be circumvented were we to agree with the appellant that a conspiracy offense may not be used as a predicate offense. Accordingly, we find no statutory limitation on the use of a § 846 conspiracy as a predicate offense charged in the same indictment as a CCE count.

Fernandez insists nevertheless that to permit the use of a § 846 conspiracy would "collapse" the elements of the CCE statute, in that one element of the requisite proof of a § 848 violation would then be missing. More specifically, Fernandez contends that since a narcotics conspiracy must always be proved to satisfy the "in concert" requirement of § 848(d)(2)(A), the same conspiracy may not be used as the felony violation required by § 848(d)(1) because this would in effect dispense with one element of the crime which the government must prove.

To allow a § 846 conspiracy to serve as a § 848 predicate offense, however, does not "collapse" the statutory scheme. Fernandez' argument presupposes that the original felony violation and the continuing series of violations are separate and distinct elements of the crime. The plain language of the statute makes it clear, however, that the elements are not completely separable, but overlap each other. Since the statute provides that the required felony violation must be one of a series of violations, an underlying conspiracy may serve as one of the series of violations required. *See United States v. Young*, 745 F.2d 733; *United States v. Ricks*, 802 F.2d 731 (4th Cir.1986); *United States v. Brantley*, 733 F.2d 1429 (11th Cir.1984), *cert. denied*, (470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1984); *United States v. Middleton*, 673 F.2d 31 (1st Cir.1982).

A-41

[2] We also note parenthetically that there is no requirement that the government must prove each element of § 848 by distinct and independent proof. Absent any clear Congressional directive, we are unwilling to read such a limitation into the statute. *See United States v. Young*, 745 F.2d 733.

Finally, Fernandez contends that the statute requires that the continuing series of violations requires conduct by the defendant other than a verbal agreement, and that that conduct be undertaken in concert with five or more others. The district court erred, it is claimed, in charging that if the defendant and five or more other people were part of an agreement to commit violations of the federal drug laws the "five or more others" element of the statute would be satisfied, because such a charge would permit conviction on the basis of the defendant's participation in the agreement itself, rather than on the continuing series of violations undertaken by him.

This argument misconstrues both the charge to the jury and the requirements of the statute. The district court charged the jury that:

> The third requirement is that the defendant committed these violations in concert with five or more other persons. This does not mean that five or more persons must have participated with the defendant in committing each violation of the continuing series, or even that five or more persons were involved in committing each violation of the continuing series, or even that five or more persons were involved in committing any one of the offenses that is part of a series of offenses constituting the continuing criminal enterprise.
>
> Moreover, it is not required that all five persons were present at the same time or at the same place, and it is not required that the defendant had personal contact with each of the five or more persons.
>
> ... it is sufficient that the government proves beyond a reasonable doubt that, during the course of the commission of continuing series of violations, the defendant and five or more other people were part of an agreement to commit violations of the federal drug law.
>
> If you determine that the defendants acted in concert with five or more persons when committing the series of violations, you must then turn to the fourth element of the offense.

[3] We find that the district court's charge properly construes the statute. The numerosity requirement of § 848 does not require that the five people be under the defendant's supervision at the same moment nor in the conduct of the same underlying felony, but must be under the defendant's supervision in the conduct of the same continuing criminal enterprise. *See United States v. Rhodes*, 779 F.2d 1019 (4th Cir.1985) *cert. denied*, — U.S. —, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986). This reasoning reaffirms our belief that the elements of a § 848 violation are not discrete, but overlap each other to a considerable degree. As such, they are not "collapsed" in the manner put forth by Fernandez.

IV.

Fernandez disputes as well the district court's charge that the use of a telephone to facilitate the § 846 conspiracy would constitute a violation of 21 U.S.C. § 843(b)[4] and satisfy the series of violations requirement of § 848. He makes two points in this regard. First, Fernandez argues that § 843(b) does not prohibit the use of a telephone to facilitate a narcotics *conspiracy*. Rather, he claims, it must be used to

4. Section 843(b) provides:

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmisson of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication. 21 U.S.C. § 843(b).

A-42

cause or facilitate the commission of an act constituting a felony and not an inchoate crime. Second, he claims that the evidence as to these counts was insufficient to support his conviction.

[4] In this case Fernandez was charged in five counts of the indictment with knowingly using a telephone to facilitate the narcotics conspiracy, in violation of 21 U.S.C. § 843(b). The district court charged the jury that a felony under the narcotics laws includes violations of § 846—the conspiracy statute. In addition, the judge charged the essential elements of the telephone counts as:

> First: That on or about the date charged, the defendant used a telephone to facilitate the conspiracy to which the count refers; and
>
> Second: That the defendant did so knowingly and intentionally.
>
> Facilitate simply means "to make easy or less difficult."

Fernandez' argument thus turns upon the same point he presented as to the § 846 conspiracy. He argues that it is only the furtherance of the same conspiracy that was facilitated by the telephone calls, and thus their use as substantive felonies is erroneous. We find these contentions without merit. We reiterate our position that the CCE statute permits *any* felony violation to serve as a predicate offense. We note that § 843(b) clearly falls within this category. The CCE statute is not in any way diminished by allowing a "telephone count" to serve as a predicate. The other major elements of § 848 provide sufficient insurance for the use of that section to prosecute professional criminals trafficking in drugs. *See United States v. Young*, 745 F.2d at 755. We therefore find that telephone counts in aid of a conspiracy may serve as predicate offenses for a § 848 violation. *See also United States v. Head*, 755 F.2d 1486 (11th Cir.1985); *United States v. Young*, 745 F.2d 733, *United States v. Wofford*, 629 F.2d 174 (4th Cir. 1981), cert. denied, 454 U.S. 867, 102 S.Ct. 307, 70 L.Ed.2d 162 (1981).

[5] Fernandez also argues that the use of a telephone proscribed under § 843(b) is a felony only when the telephone is used to facilitate the commission of an overt act or substantive crime and not in furtherance of a conspiracy. We find this argument without merit. *See United States v. Thomas*, 586 F.2d 123 (9th Cir.1978), *cf. United States v. Adams*, 759 F.2d 1099, 1117 (5th Cir.1985).[3]

Fernandez contends as well that the evidence was insufficient to support his conviction on these counts. We must determine whether there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision. *United States v. Adams*, 759 F.2d at 1113.

Our review of the record indicates substantial evidence to support the jury's conclusion. The government witness testified as to the meaning of the coded language in the telephone calls and the jury could certainly have concluded that the circumspect nature of the calls was consistent with a conspiracy to consummate the cocaine transactions.

V.

Accordingly, we will affirm the judgments of conviction of the district court.

3. In *United States v. Adams*, 759 F.2d 1099, 1117, we did not directly address the issue raised here. However, we upheld convictions under § 843(b) where the telephone was used in furtherance of a conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846.

A-43

...r of the bankruptcy court "is ...on interlocutory appeal, a ...ppeal to the court of appeals will ...e be permitted under 28 U.S.C. ..." *In re West Electronics*, 882 ...82. *See also, In re White Beauty ...c.*, 841 F.2d 524, 525 (3d Cir.1988) (jurisdiction is limited to final orders ...gments of the bankruptcy courts ...rict courts.") It thus follows that *...tion* and *Taylor* we at least implied ...rmined that an order denying a ...o dismiss a Chapter 11 proceeding ...l order within 28 U.S.C. § 158(a)[1] ...e, while we acknowledge that the ... of the other courts of appeals cit... district court support its conclu... are constrained to follow our own ...ts and thus reverse.

...der of the district court of April ..., will be reversed and the matter ...remanded to the district court to ...rst Jersey's appeal on the merits.

...ded). While this suggests that the ...s focusing on the district court order as ...shed from the bankruptcy court order, ...e pragmatic considerations apply to ...le also recognize that in *In re West ...cs*, 852 F.2d at 82, we suggested that an ...ying without prejudice relief from the ...e stay might not be final "because the ...as incomplete, discovery was ongoing ...urt required further research on the ...re it," though on the facts in that case ... was final. But those procedural re... qualitatively different from the reasons ...ial of the motion to dismiss here for, ...rds of *West*, First Jersey "was denied ...use in the bankruptcy court's view it ...ntitled to it when it filed its motion."

UNITED STATES of America

v.

Carlos Eduardo FERNANDEZ.

Appeal of Carlos FERNANDEZ.

No. 90-5429.

United States Court of Appeals, Third Circuit.

Submitted under Third Circuit Rule 12(6) Oct. 9, 1990.

Decided Oct. 18, 1990.

Defendant sought postconviction relief after the Court of Appeals, 822 F.2d 382, affirmed his conviction for conspiracy to import cocaine and for violation of continuing criminal enterprise statutes. The United States District Court for the District of New Jersey, Dickinson R. Debevoise, J., resentenced defendant without requiring new presentence report, and defendant appealed. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) separate convictions for both continuing criminal enterprise and for predicate offense did not violate double jeopardy clause, and (2) defendant was not entitled to new presentence report.

Affirmed.

1. Double Jeopardy ⇐151(5)

Separate convictions on charges of continuing criminal enterprise and predicate offense of conspiracy to import cocaine did not violate double jeopardy clause; defendant received single sentence which did not exceed punishment available on continuing criminal enterprise count. U.S.C.A. Const. Amend. 5.

2. Criminal Law ⇐996(3)

Resentencing to correct illegal sentence did not require new presentence report where court indicated that it would resentence on basis of facts, record and situation as existed at time of original sentence. Fed.Rules Cr.Proc.Rules 32(c)(1), 35(a), 18 U.S.C.App. (1982 Ed.).

Martin L. Schmukler, New York City, for appellant.

Michael Chertoff, U.S. Atty., Edna Ball Axelrod, Chief, Appeals Div., Eric L. Muller, Asst. U.S. Atty., for appellee.

Before GREENBERG, HUTCHINSON, and COWEN, Circuit Judges.

OPINION

GREENBERG, Circuit Judge.

This matter is before the court on an appeal by Carlos Fernandez from an order dated May 21, 1990, and entered May 24, 1990, in this criminal case. The circumstances leading to this appeal are as follows.

At a jury trial in 1985 Fernandez was convicted of: (1) conspiracy to distribute and possess cocaine with intent to distribute, 21 U.S.C. § 841(a)(1), count 1; (2) conspiracy to import cocaine, 21 U.S.C. § 952(a), count 2; (3) knowingly engaging in a continuing criminal enterprise, 21 U.S.C. § 848, count 3; and (4) knowingly using a telephone in facilitating the conspiracy to distribute cocaine, 21 U.S.C. § 843(b), counts 10, 11, 12, 19, and 27. He was sentenced to a term of imprisonment of 40 years and was fined $100,000 on count 3, the continuing criminal enterprise count and to a concurrent term of imprisonment of 20 years on count 1 involving conspiracy. On count 2, the other conspiracy count, he was sentenced to a term of imprisonment of 20 years concurrent with the sentence on count 3 but consecutive to the sentence on count 1. In addition, Fernandez was fined $100,000 on counts 1 and 2. On each of the five telephone counts he was sentenced to terms of imprisonment of four years, consecutive to each other but concurrent with the other sentences. Effectively, therefore Fernandez received a term of imprisonment of 40 years and a $300,000 fine.

Fernandez appealed and we affirmed the judgment, though we indicated that "there may be problems with the formal terms of the sentence, [but] the matter was not

A-44

raised before us and in all events it may be presented to the District Court. See Fed. R.Crim.P. 35." *United States v. Fernandez*, 822 F.2d 382, 383 n. 2 (3d Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 391 (1987). Thereafter Fernandez filed a motion in the district court "to strike the convictions and sentences imposed as to count one and count two" under Fed.R.Crim.P. 35(a) on the ground that under *United States v. Aguilar*, 849 F.2d 92 (3d Cir.1988), the conspiracies charged were lesser included offenses within the continuing criminal enterprise. The district court in an unreported opinion filed March 12, 1990, denied the motion, distinguishing *Aguilar* on the basis that that case dealt with the double jeopardy claim in a successive prosecution context and in this case the only concern was with a multiple punishment problem. Accordingly, following *United States v. Gomberg*, 715 F.2d 843, 851–52 (3d Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1440, 79 L.Ed.2d 760 (1984), the court indicated that it would impose a general sentence on all three counts not to exceed the punishment available on the most serious offense, the continuing criminal enterprise count.

On April 30, 1990, Fernandez, through an attorney who had not represented him at trial, wrote the court and requested that it obtain an "updated probation report." In the letter he set forth that there were no expressions of contrition in Fernandez's original sentencing proceedings because of the "siege mentality in his defense." The court did not obtain the updated report.

Fernandez was resentenced on May 14, 1990. At that time his attorney urged that Fernandez be given a shorter sentence than originally imposed, pointing out that his institutional adjustment had been good. He asked that there be a "full-scale institutional evaluation." The court, however, regarded this adjustment as more germane to parole than resentencing and indicated that it was "going to sentence on the basis of the facts, the record and the situation as it existed at the time of the original sentence." It then imposed a general sentence of a term of imprisonment of 40 years on counts 1, 2 and 3 with a single $100,000 fine. The sentences previously imposed on the telephone counts were reimposed, to be concurrent to the general sentence. The appeal followed.

Fernandez raises two issues on this appeal. First he contends that the court erred in not vacating the sentences on counts 1 and 2, concerning the conspiracies, as, in his view, "the double-jeopardy proscription" and the due process clause of the Fifth Amendment preclude "cumulative punishment" for the continuing criminal enterprise and the predicate offenses. Second he urges that the court erred in not obtaining a revised, current presentence report. While Fernandez asserts that we should exercise plenary review on both issues, and we agree with respect to his vacation contention as it implicates the interpretation and application of legal precepts, *see United States v. Fernandez*, 822 F.2d at 384, we review the court's determination not to obtain a new presentence report under an abuse of discretion standard. *See Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 936 (3d Cir.1974), *cert. denied*, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975).

Fernandez concedes that the district court in resentencing followed the procedure specified in *United States v. Gomberg*, 715 F.2d at 851–52. He nevertheless urges that we vacate the convictions on counts 1 and 2 as he regards *Gomberg* as overruled to the extent germane here by *Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). In *Ball* a previously convicted felon was convicted and sentenced both for receiving a firearm shipped in interstate commerce and possessing the same firearm in violation, respectively, of 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1202(a)(1). The Supreme Court held that only one of the convictions could stand because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." 470 U.S. at 862, 105 S.Ct. at 1672. Thus, the sections were "overlapping statutes" which Congress had not " 'directed to separate evils.' " *Id.* at 864, 105 S.Ct. at 1673. But the Court quite clearly emphasized that it reached its result because it considered that Congress did not intend both convictions to stand and it was thus carrying out Congressional intent. *Id.* at 864, 105 S.Ct. at 1673.

[1] We had occasion to consider *Ball* in *United States v. Grayson*, 795 F.2d 278, 286 (3d Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 927, 93 L.Ed.2d 978 (1987). Insofar as significant here, in *Grayson* the defendant was first convicted and sentenced for a drug conspiracy under 21 U.S.C. § 846 and was later convicted of engaging in a continuing criminal enterprise under 21 U.S.C. § 848. The conspiracy was a predicate to the continuing criminal enterprise. We held that the defendant's sentence for the continuing criminal enterprise could not stand, though the conviction itself could. We consider *Grayson* to be controlling. Unlike the situation in *Ball* in which discrete statutes were not directed to separate evils, the narcotics conspiracy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes. While the conspiracy statutes punish illegal agreements to import and to distribute and possess cocaine with intent to distribute, the continuing criminal enterprise statute provides for punishment of persons "trafficking in prohibited drugs on a continuing, widespread substantial and supervisory basis." *United States v. Fernandez*, 822 F.2d at 384. There is simply no indication in the statutes or any legislative history of which we are aware that Congress did not intend to permit separate convictions to stand for the conspiracy and continuing criminal enterprise offenses.[1]

We realize that *Grayson* involved successive prosecutions and that Fernandez was convicted of the conspiracy and continuing criminal enterprise charges at one trial. But we do not see why that matters. There is no reason to conclude that the intent of Congress to allow separate convictions for these offenses to stand is dependent on the time of the indictment, trial, or convictions. Furthermore, in considering Fernandez's vacation argument it is important to recall the values underlying the double jeopardy protections. As we explained in *United States v. Aguilar*, 849 F.2d at 96, "[i]t is commonly recognized, as this Court recently noted, 'that the double jeopardy clause serves three primary purposes. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' " (Omitting citations.) None of these values are offended by allowing the three convictions to stand inasmuch as only a single punishment, not greater than that allowed by law for the most serious offense, was imposed following a single trial. *See also Government of the Virgin Islands v. Brathwaite*, 782 F.2d 399, 407–08 (3d Cir.1986).

Fernandez attempts to distinguish *Gomberg* on the ground that it is not necessary to retain the convictions on counts 1 and 2 because, unlike the situation in which a court is sentencing after trial in the realization that a reversal is possible on one or more counts, his convictions were affirmed on the three counts prior to resentencing. Thus, he argues that "there is no risk that [he] may avoid all punishment for his crimes by gaining a reversal on the single conviction on the compound offense if he has already had his convictions on the less inclusive counts vacated in the lower court." Brief at 13. The inference to be drawn from this argument is that the convictions on counts 1 and 2 now are meaningless.

The difficulty with the argument is manifest. Initially we observe that if Fernandez is correct on this point then he is wasting his time, or at least that of his attorney, in advancing his contention that the convictions on counts 1 and 2 should be vacated. In fact, however, we cannot be certain that the convictions on those counts can never be significant. While the circumstance that we have affirmed the conviction on count 3 makes it unlikely that the government will ever have to rely on the convictions on counts 1 and 2 to justify

1. *See United States v. Fernandez*, 822 F.2d at 384–85.

A-45

A-46

Fernandes's incarceration, in view of the possibility of relief under 28 U.S.C. § 2255 on grounds that might not now even be contemplated we cannot be so bold as to assert that it can never happen. Furthermore, it is possible that there may be collateral consequences from the entry of the judgments of conviction on all three counts from which Fernandes need not be shielded by double jeopardy principles as Congress intended that predicate conspiracy and continuing criminal enterprise convictions may stand. While the Supreme Court in *Ball* was also concerned with collateral consequences and pointed out that the conviction itself could have adverse effects, this was in the context of its conclusion that Congress did not intend both convictions to stand. *Ball v. United States*, 470 U.S. at 864–65, 105 S.Ct. at 1673.

In reality Fernandes's argument that the affirmance of his convictions on direct appeal entitles him to a vacation of the judgments on counts 1 and 2 proves too much. Surely if he is correct then any defendant convicted on multiple counts but sentenced generally on all of them is entitled to have the convictions vacated on the included counts if his convictions and the sentence are first affirmed on direct appeal. We see no reason why the circumstance that Fernandes had a substantial basis to make a motion under Rule 35(a) on grounds other than a claim of entitlement to a vacation of his convictions, justifies awarding him additional relief which would otherwise not have been available.

We realize that it is possible to combine the convictions themselves without vacating those on the lesser counts and then impose a single sentence. *See United States v. Aiello*, 771 F.2d 621, 632–35 (2d Cir.1985). The *Aiello* court thought that necessary so that the defendant does not suffer from collateral consequences from having the judgment of conviction on the lesser count remain. We, however, do not understand why, if Congress intended both convictions to stand, that we should be concerned with the collateral consequences of the conviction for the lesser offense. The only reason for concern would seem to be that the collateral consequences could be regarded as an additional punishment, somehow precluded by double jeopardy considerations, for certainly the conviction for the lesser offense in itself is not a collateral consequence. But collateral consequences following convictions are not additional punishments over and above those imposed at the time of sentencing and thus such consequences are not barred by the imposition of the original punishment. *See, e.g., Emory v. Texas State Bd. of Medical Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984); *LeTourneur v. Immigration and Naturalization Service*, 538 F.2d 1368, 1370 (9th Cir.1976), *cert. denied*, 429 U.S. 1044, 97 S.Ct. 748, 50 L.Ed.2d 757 (1977). *See also Helvering v. Mitchell*, 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917 (1938). It inexorably follows that if there may be collateral consequences after sentencing from a conviction for a single offense, the double jeopardy clause is not violated if the same consequences follow from a conviction for a predicate or lesser offense which, though combined with a greater offense for sentencing, is permitted to stand.

We recognize that the Court of Appeals for the Ninth Circuit in *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990), also has reached a result different than *Gombery* and different from *Aiello* as well. The court indicated that "[i]t is clear from *Jeffers*[2] that Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation. The remedy required is for the district court to vacate the convictions under Counts One and Two for the conspiracies in violation of section 848." 886 F.2d at 1582 (omitting citation). We do not understand why the second sentence follows from the first. If there is only one sentence and it is within the statutory limits for punishment for the more serious offense then there is not a cumulative punishment. It seems to us that the remedy afforded the defendant in *Hernandez-Escarsega* frustrates the Congressional intent and is surely not required by the double jeopardy clause.[3]

[2] The final issue relates to the request for a new presentence report. The matter was before the district court on Fernandes's motion under Rule 35(a) to correct an illegal sentence.[4] The district court indicated that "I'm going to sentence on the basis of the facts, the record and the situation as it existed at the time of the original sentence." App. at 43. Thus, even assuming the very doubtful proposition that on a resentencing under Rule 35(a), Fed.R.Crim.P. 32(c)(1) relating to presentence investigations is applicable, the district court did not abuse its discretion in not obtaining a new presentence report.[5] There was a presentence report at the original sentencing, and thus "the record [had] information sufficient to enable the meaningful exercise of sentencing discretion," Rule 32(c)(1), and the court, as required under that rule, by indicating that it was sentencing on the basis of the circumstances as they existed at the time of the original sentencing explained why a new report was not needed.

The order of May 24, 1990, will be affirmed.

2. The court was referring to *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), which it considered along with *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). We considered *Jeffers* and *Garrett* in *United States v. Grayson*, 795 F.2d at 287–88.

3. The *Hernandez-Escarsega* court thought that *Ball* "require[d] vacation of the convictions," 886 F.2d at 1582 n. 14. For the reasons we have already explained, we do not.

4. We are using the versions of Rules 32(c)(1) and 35(a) applicable to offenses committed prior to November 1, 1987.

A-47

UNITED STATES of America,
Appellant,
v.
Stanley PHARR.
No. 90-1284.
United States Court of Appeals, Third Circuit.
Argued Aug. 22, 1990.
Decided Oct. 19, 1990.

Government appealed from an order of the United States District Court for the Eastern District of Pennsylvania, Joseph S. Lord, III, J., which departed from the applicable sentence range under the United States Sentencing Commission Guidelines. The Court of Appeals, Cowen, Circuit Judge, held that defendant's postarrest efforts to overcome his drug addiction and the effect that incarceration would have on those efforts were inappropriate grounds for departure from the sentencing guidelines.

Reversed and remanded.

1. Criminal Law ⇐1134(1, 2)

Court's review of a determination whether the Sentencing Guidelines have adequately taken a particular factor into account is plenary; likewise, question of whether a consideration is of the type that can justify a discretionary departure from Guidelines is a question of law over which court's review is plenary. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(b).

2. Criminal Law ⇐1252

Self-improvement is not the type of conduct contemplated by the acceptance of

5. It should be noted that it was not unusual that an additional presentence report was not obtained for a resentencing. *See United States v. Carbistraro*, 734 F.Supp. 1110, 1120 (D.N.J. 1990).

A-48

Supreme Court of the United States

No.

A-543

Carlos Eduardo Fernandez,

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 15, 1991.

/s/ David H. Souter
Associate Justice of the Supreme Court of the United States

Dated this 14th day of January, 1991.

A-49

APPENDIX B

CARLOS EDUARDO F ANDEZ | THE DIS CT OF NEW JERSE

DOCKET NO. CR 85-86-01

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 (9/

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 2 DAY 7 YEA 86

SEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to ha counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Raymond Takiff
(Name of Counsel)

A

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [ ] NOT GUILTY

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

& & ENT

Defendant has been convicted as charged of the offense(s) of conspiring to distribute and posses: with intent to distribute cocaine, a schedule II controlled substance. [21:841(a)(1) CT 1. Conspiring to import cocaine, a schedule II contro ed substance. [21:952(a)] Ct. 2. Knowingly did engage in a continuing criminal enterprise. Ct. 3. [21:848] Knowingly did use a telephone in facilitating the conspiracy to distribute cocaine, a schedule II controlled substance. Cts. 10,11,12,19 & 27. [21:843(b)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of forty years

ECT

TION

S -

and fined $100,000.00 on Count 3. On Count 1 imprisonment for a term of twenty years and fined $100,000.00 to be concurrent with sentence impose on Count 3. On Count 2 imprisonment for a term of twenty years and fine $100,000.00 to be served consecutively to the term sentence imposed on Count 1 and concurrently with the sentence imposed on Count 3. On Count 10,11,12,19 and 27 imprisonment for a term of four years on each of the Counts to be served consecutively to each other but concurrently with al the terms of imprisonment imposed on Counts 1,2 and 3. It is further ordered that the defendant stand committed until said fine is paid or he is otherwise discharged according to law. A Special Assessment of $50.0 is imposed on each of the eight counts, for a special assessment total o $400.00.

AL ons

TION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

MENT ION- S

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

S. District Judge

S Magistrate

B-1

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Dickinson R. Debevoise Date 2-7-86

5-21-90
5:00

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. Dickinson R. Debevoise
v.	:	Criminal No. 85-86
CARLOS EDUARDO FERNANDEZ	:	O R D E R

The Court having ordered by opinion dated March 9, 1990, that defendant Carlos Eduardo Fernandez be resentenced, and the Court having heard the arguments of counsel for Fernandez and for the United States Attorney's Office (Paul B. Brickfield, Assistant U.S. Attorney, appearing) in open court on May 14, 1990, and for good cause shown,

It is hereby ORDERED AND ADJUDGED that the sentence be as follows:

1. On Counts 1, 2 and 3 of Indictment No. 85-86, a "general sentence" is imposed of 40 years imprisonment and a $100,000 fine.

2. On Counts 10, 11, 12, 19 and 27 of Indictment No. 85-86, the defendant is sentence to 4 years imprisonment on each count to be served consecutively to each other but concurrently with the general sentence imposed on Counts 1, 2 and 3.

3*

SO ORDERED:

B-2

HON. DICKINSON R. DEBEVOISE
United States District Judge

Dated: May 21, 1990

47

* Nothing herein shall preclude defendant from [illegible] Rule 35 [illegible] 120 days hereof [illegible] such time as may be allowed by law. In [illegible] (that the sentence shall not exceed [illegible] years).

ORIGINAL

Supreme Court, U.S.
FILED
APR 24 1991
OFFICE OF THE CLERK

No. 90-7210

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CARLOS EDUARDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's drug conspiracy convictions must be vacated on double jeopardy grounds because he was also convicted of engaging in a continuing criminal enterprise.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-7210

CARLOS EDUARDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
FOR THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A44-A48) is reported at 916 F.2d 125.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1990. On January 14, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 15, 1990. The petition for a writ of certiorari was filed on February 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to distribute and possess cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 1); one count of conspiring to import cocaine, in violation of 21 U.S.C. 952(a) (Count 2); one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 3); and five counts of using a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b) (Counts 10, 11, 12, 19, and 27). He was sentenced to 40 years' imprisonment on the CCE count; 20 years' imprisonment on the distribution conspiracy count, to run concurrently with the sentence on the CCE count; 20 years' imprisonment on the importation conspiracy count, to run consecutively to the sentence on the distribution conspiracy count and concurrently with the sentence on the CCE count; and four years' imprisonment on each of the telephone counts, to run consecutively to each other but concurrently with the other sentences. In addition, he was fined $100,000 on the CCE count and on each of the conspiracy counts. Thus, he originally "received a term of imprisonment of 40 years and a $300,000 fine." Pet. App. A44. The district court also imposed a $50 assessment under 18 U.S.C. 3013 "on each of the eight counts, for a special assessment total of $400.00." Id. at B1.

The court of appeals affirmed. United States v. Fernandez, 822 F.2d 382 (3d Cir.), cert. denied, 484 U.S. 963 (1987) (reprinted at Pet. App. A38-A43). However, it indicated that

"there may be problems with the formal terms of the sentence," and it invited petitioner to present the matter to the district court by way of a motion under Fed. R. Crim. P. 35. 822 F.2d at 383 n.2 (Pet. App. A39 n.2).

Petitioner then filed a Rule 35 motion asking the district court to strike the convictions and sentences imposed on the two drug conspiracy counts. The district court denied the motion. However, it amended the sentence by imposing a "general sentence" of 40 years' imprisonment and a single $100,000 fine on counts 1, 2, and 3. Pet. App. B2. It also reimposed the sentences previously imposed on the telephone counts, so that those sentences would run concurrently with the general sentence. The court did not impose an assessment pursuant to Section 3013. The court of appeals affirmed. Pet. App. A44-A47.

2. On his second appeal, petitioner contended that the district court had erred by declining to vacate the convictions on the drug conspiracy counts. In petitioner's view, the existence of those convictions constitutes cumulative punishment in violation of the Double Jeopardy Clause, even though he did not receive consecutive sentences. The court of appeals noted that, despite his claim that he was being subjected to cumulative punishment in violation of the Constitution, petitioner had suggested that, as a practical matter, "the convictions on counts 1 and 2 now are meaningless." Pet. App. A46. After wondering why, if that were so, petitioner was "wasting his time" seeking to have the drug conspiracy convictions vacated, the court noted that the drug

conspiracy convictions might become significant if the CCE count were ever overturned on collateral review. Id. at A46-A47.

In support of his contention that the drug conspiracy counts had to be vacated, petitioner relied primarily on Ball v. United States, 470 U.S. 856 (1985), in which this Court held that separate convictions for receiving and possessing the same firearm could not stand. The court of appeals did not believe that Ball controlled: "Unlike the situation in Ball in which discrete statutes were not directed to separate evils, the narcotics conspiracy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes. While the conspiracy statutes punish illegal agreements to import and to distribute and possess cocaine with intent to distribute, the continuing criminal enterprise statute provides for punishment of persons 'trafficking in prohibited drugs on a continuing, widespread, substantial and supervisory basis.'" Pet. App. A46, quoting United States v. Fernandez, 822 F.2d at 384 (Pet. App. A41). The court recognized that petitioner could not receive consecutive sentences on the drug conspiracy and CCE counts and that petitioner might suffer adverse collateral consequences as a result of the conspiracy convictions. But it held that "the double jeopardy clause is not violated if [adverse collateral] consequences follow from a conviction for a predicate or lesser offense which, though combined with a greater offense for sentencing, is permitted to stand." Pet. App. A47.

The court acknowledged that the Ninth Circuit had held in United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582, cert.

denied, 110 S. Ct. 3237 (1990), that "'[i]t is clear from Jeffers [v. United States, 432 U.S. 137 (1977),] that Congress did not intend to allow cumulative punishment for violations of section 846 conspiracies and the greater offense of a section 848 CCE violation,'" Pet. App. A47, and therefore had vacated the defendant's drug conspiracy conviction. However, the court below did "not understand why" the conclusion that a court may not impose consecutive punishments for a drug conspiracy offense and a CCE offense makes it necessary to vacate a drug conspiracy conviction when a defendant is also convicted under Section 848. Id. at A47-A48.

ARGUMENT

As the court of appeals recognized, Congress did not intend to permit cumulative punishment for participating in a drug conspiracy and engaging in a continuing criminal enterprise, at least where the evidence supporting the "in concert" element of the CCE offense is essentially indistinguishable from the evidence supporting the drug conspiracy charge. This Court stated in Garrett v. United States, 471 U.S. 773, 794 (1985), that "[t]he focus of the analysis in Jeffers was the permissibility of cumulative punishments for conspiracy under § 846 and for CCE under § 848, and the plurality reasonably concluded that the dangers posed by a conspiracy and a CCE were similar and thus there would be little purpose in cumulating the penalties" in such circumstances. See Jeffers v. United States, 432 U.S. at 155 ("the first issue to be considered is whether Congress intended to allow

cumulative punishment for violations of §§ 846 and 848. We conclude that it did not") (plurality opinion).

The court of appeals also correctly recognized that it does not follow that a conviction on a drug conspiracy count must be vacated when a defendant is also convicted on a CCE count, even though a number of courts of appeals have held that a drug conspiracy conviction should be vacated in such a case. United States v. Rivera, 900 F.2d 1462, 1478 (10th Cir. 1990); United States v. Butler, 885 F.2d 195, 201-202 (4th Cir. 1989); United States v. Maull, 806 F.2d 1340, 1346-1347 (8th Cir. 1986), cert. denied, 480 U.S. 907 (1987); United States v. Cruz, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987); United States v. Schuster, 769 F.2d 337, 344-346 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); United States v. Dickey, 736 F.2d 571, 596-597 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985); United States v. Jefferson, 714 F.2d 689, 703 & n.28 (7th Cir. 1983); United States v. Smith, 703 F.2d 627, 628 (D.C. Cir. 1983); United States v. Webster, 639 F.2d 174, 182 (4th Cir.), cert. denied, 454 U.S. 857 (1981).

This Court provided no such relief in Jeffers v. United States, see 432 U.S. at 157-158, and this Court's decision in Ball v. United States should not be construed to require such a result. The question in Ball v. United States was whether a previously convicted felon could be convicted for receiving a firearm, in violation of 18 U.S.C. 922(h)(1), and possessing the same weapon, in violation of 18 U.S.C. App. 1202(a)(1) (1982). The Court held

that "Congress did not intend [the defendant's] conduct to be punishable under both §§ 922(h) and 1202(a)," even though he had not been sentenced consecutively. 470 U.S. at 864. The Court explained that "[t]he separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." Id. at 865.

The holding in Ball v. United States need not be extended from the simple factual context of receipt and possession of a gun to the very different context of a complex CCE case. Proof of receipt of a gun will always show possession of the gun, and possession will always show receipt except in the unusual circumstance where the defendant manufactured the gun. 470 U.S. at 862 & n.9. In the context of two such "overlapping provisions," id. at 859, it is reasonable to conclude that Congress did not intend to authorize double convictions. But as the Seventh Circuit stated in reaching the same conclusion as the court below, "[i]t is not illogical to convict a person of both agreeing to do something (§ 846) and succeeding on a grand scale (§ 848)." United States v. Bond, 847 F.2d 1233, 1238 (1988).

This Court's holding in Ball v. United States was based on the concern that the presence of an additional conviction on a defendant's record might be significant, even in the absence of a consecutive sentence, because "the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense[,] * * * may be used to impeach the defendant's

credibility and certainly carries the societal stigma accompanying any criminal conviction." 470 U.S. at 865. This case is clearly distinguishable from United States v. Ball in terms of its effects. Petitioner has been convicted under the "drug kingpin" provision, as the CCE statute is popularly known. He therefore is ineligible for parole, since Section 848 makes parole unavailable. It is hard to believe that a conviction on any lesser included offense could increase the stigma he bears in light of his CCE conviction or further undermine his credibility. And there is no reasonable likelihood that petitioner's conspiracy convictions could result in an increased sentence under a recidivist statute, since petitioner will be in prison until around 2025 and he has been validly convicted on six other counts.

Nor does the special assessment statute, 18 U.S.C. 3013, require a different result. That statute imposes a $50 special assessment for each felony count on which a defendant is convicted. But the district court did not order a special assessment in this case, so petitioner has suffered no injury on that account. More generally, we believe that in light of Jeffers v. United States, supra, it would be error for a court to impose more than a single special assessment for conviction on a CCE count and coterminous conspiracy counts, so the special assessment statute, if properly applied, should never result in increased penalties for multiple convictions in this setting.

Petitioner's reasons for seeking to have his drug conspiracy convictions vacated demonstrate why he is not entitled to that

relief. As the court of appeals recognized, petitioner presumably desires to have the convictions vacated in the hope that he may obtain release from prison if in the future his CCE conviction is undermined "on grounds that might not now even be contemplated," Pet. App. A47, but that do not affect the validity of the drug conspiracy convictions. Yet petitioner would not be entitled to release in that event. In United States v. Bond, the Seventh Circuit stated that "in the event a collateral attack affects the validity of the CCE conviction * * * the sentence under § 846 lawfully could become the basis of punishment." 847 F.2d at 1238. "That would happen automatically if the § 846 sentences remain in force, served concurrently with the CCE sentence," the court added, but "would require extra motion if the § 846 sentences had to be vacated now and resurrected at some future time." Id. at 1238-1239.

Based on the same assumption -- that the conspiracy convictions should be preserved for use in the event the CCE conviction is at some point set aside -- the Second Circuit held in a case like this one that "convictions on the lesser offenses should be combined with the conviction on the greater offense." United States v. Osorio Estrada, 751 F.2d 128, 135 (1984), modified on reh'g on other grounds, 757 F.2d 27 (1985); see also United States v. Aiello, 771 F.2d 621, 632-635 (2d Cir. 1985). "Under this method, the convictions on the lesser counts become combined with that of the compound offense and would not be merged out of existence. This leaves the part of the conviction on the lesser

offense unaffected should the compound offense be invalidated as a matter of law. The convictions on the lesser offenses would not exist as separate convictions so long as the § 848 conviction remained in place." 751 F.2d at 135. A concurring judge, who "did not know what this means ontologically," thought that it would be "appropriate to vacate the convictions on the two [conspiracy] offenses, on the condition that the convictions on those offenses would be reinstated in the event that the conviction on the [CCE] offense * * * were ever overturned for reasons not affecting the validity of the convictions" on the conspiracy offenses. Ibid. (Kearse, J., concurring). We are aware of no court of appeals that has ruled or suggested to the contrary. Thus, even in those courts where conspiracy convictions are vacated in the presence of coterminous CCE convictions, the courts would apparently reinstate the conspiracy convictions in the event that the CCE conviction is invalidated.

There is, in sum, no disagreement among the courts with the proposition that the conspiracy counts should be available to serve as the basis for punishment in the event that a defendant's CCE conviction is overturned on collateral review. The only dispute relates to the proper method for ensuring that such a defendant does not go free if his CCE conviction is reversed. That dispute, however, amounts to nothing more than an issue of bookkeeping, which has no real effect on the parties. While the courts of appeals have settled on different methods to resove that bookkeeping issue, the issue is not one of any substantial

significance to the parties or to the administration of justice. For that reason, the question presented in this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

NO. 90-7210

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CARLOS EDUARDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON APRIL 24, 1991.

CARLOS EDUARDO FERNANDEZ
FEDERAL REGISTER NO. 22871-004
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/Kenneth W. Starr
KENNETH W. STARR
SOLICITOR GENERAL

April 24, 1991

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUARDO FERNANDEZ,

PETITIONER PRO SE

v.

UNITED STATES OF AMERICA -

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF PURSUANT SUPREME COURT RULE 15.6

CARLOS EDUARDO FERNANDEZ
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Petitioner Pro Se

TABLE OF CONTENTS

SUBEJCT	PAGE NUMBER(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PROCEDURAL HISTORY	1
COUNTER-ARGUMENT TO THE BRIEF IN OPPOSITION	2-8
SUMMARY	8-10
CERTIFICATE OF SERVICE	Appended

TABLE OF CITATIONS

CASES	PAGE NUMBER(S)
BALL v. UNITED STATES, 470 U.S. 856 (1985)	2,5-6, 8-9
BLOCKBURGER v. UNITED STATES, 284 U.S. 299(1932).	5
JEFFERS v. UNITED STATES, 432 U.S. 137 (1977)....	passim
MISSOURI v. HUNTER, 459 U.S. 856 (1985)	4
UNITED STATES v. BOND, 847 F.2d 1233 (7th Cir. 1988)	6
UNITED STATES v. MENDOZA, 902 F.2d 693 (8th Cir. 1990)	10

STATUTES	
18 U.S.C. § 3015	5
21 U.S.C. § 846	passim
21 U.S.C. § 848	passim
28 U.S.C. § 1254(1)	1

SUPREME COURT RULES	
15.6	Certificate of Service
29.3	""

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-7210

CARLOS EDUARDO FERNANDEZ, PETITIONER PRO SE

v.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
FOR THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF PURSUANT
TO SUPREME COURT RULE 15.6

PROCEDURAL HISTORY

The judgement of the court of appeals was entered on October 18, 1990. On January 14, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 15, 1990. The petition for a writ of certiorari was filed on February 14, 1990 Respondent United States sought and was granted an enlargement of time within which to file a Brief in Opposition by April 24, 1991. The Petitioner received a copy of this Brief in Opposition on April 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-ARGUMENT TO THE BRIEF
IN OPPOSITION

The Respondent argues to this Court that the "court of appeals [below] correctly recognized that it does not follow that a conviction on a drug conspiracy count must be vacated when a defendant is also convicted on a CCE count, even though a number of courts of appeals have held that a drug conspiracy conviction should be vacated in such a case." See Brief in Opposition (hereafter, "Opp Br.-___") at 6(citing cases).[1.7] The Government observes, in support of its view the court below correctly ruled, that this "Court provided no such relief in Jeffers v. United States, see 432 U.S. at 157-158, and this Court's decision in Ball v. United [470 U.S. 856 (1985)] should not be construed to require such a result." Opp Br. at 6. From the outset, Petitioner would point out that the fact the Court did not order vacatur of the conspiracy drug offense in Jeffers does not support the government's argument that the Third Circuit ruled correctly in the case at bar. At the time Jeffers was decided, the plurality deemed it noteworthy to recapitulate that court of appeals observation that "before this case it was by no means settled law that §846 [of Title 21 U.S.C.] was a lesser incldued offense of § 848." Id. at n.20. That is not now the present context of the law, where, unlike the situation at the time Jeffers was decided, all of the court of appeals[2./], with

1./ The contours of the conflict between the courts of appeals, as to what double jeopardy principles require in the event of conviction for the Continuing Criminal Enterprise Offense (21 U.S.C. § 848 - hereafter,"CCE") and felony drug conspiracy offenses, is described in the Petition (hereafter, "Pet.-__") at 15 thru 18, also, notes 9 thru 14 Ibid.

2./ The minority viewpoints are described in the Petition at at 17, also, notes 9,11-14.

noted exceptions of the second, third and seventh circuits, have held that the felony drug conspiracy violation is a lesser included offense of the CCE offense -- and that double jeopardy principles require that the lesser incldued convictions and sentences be vacated to avoid constitutionally impermissible multiple punishment from transpiring. Cf. Opp Br. at 6 and compare, Pet. at 15 thru 17 (collecting and discussing cases). Moreover, the main reason that conspiracy conviction in Jeffers survived vacatur was not because the Court did not deem the conviction impermissible punishment, but because Jeffers involved a "waiver" problem that deflected the Court from addressing a question of whether the conspiracy conviction itself constituted impermissable multimple punishment for the same offense. The Court determined that Petitioner Jeffers, having been responsible for creating the succesive prosecutions that led, in turn, to the successive convictions and punishment on the CCE and conspiracy offenses, could not be heard to complain of more than than the extent the fines imposed for the CCE and conspiracy exceeded the ceiling for fines authorized for the CCE offense. Id., 432 U.S. 157 ("Our conclusion that Congress did not intend to impose cumulative penalties under §§846 and 848 is of minor significance in this particular case. Since the Government had the right to try petitioner on the § 848 indictment, the court had the power to to sentence him to whatever penalty was authorized by that statute. It had no power, however, to impose on him a fine greater than the maximum"). There is another important reason why Jeffers did not delve into the double jeopardy issue of cummulative punishment presented sub judice. That reason is traceable to the observation by the Court in Jeffers that "both parties, throughout

the proceedings, appear to have assumed that no cumulative punishment problem is present in this case, [however,] the imposition of the separate fines seems squarely to contradict that assumption." Id., 432 U.S. 154-55. It is unremarkable that the Court did not reach further in resolving the relationship between the CCE and conspiracy conviction, as a cummulative punishment matter, further than the "squarely" apparent cummulative punishment problem regarding the multiple fines. History and reason bear witness that it is not the mission of this Court to reach too much further in pronouncing judgements beyond the clearly marked controversies between the parties at bar. Neither the Untied States. nor Petitioner Jeffers, sufficiently joined the issue as has the Petitioner in the case sub judice. There is one additional word that need be said regarding why the failure of the Court in Jeffers to vacate the conspiracy conviction of the petitioner in that case, should not properly be deemed dispositive of the right of the Petitioner sub judice to have this issue confronted and resolved via certiorari review. At the time Jeffers was decided, the Court did not have the current hindsight of jurisprudence that has evolved since that plurality opinion was handed down. Now, the Court has the benefit of its decision in Missouri v. Hunter, 459 U.S. 359, 368 (1983), which teaches that where cummulative punishment is not intended by Congress for offenses that are separately codified, one of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. The Court did not have the benefit of a plethora of courts of appeals which have squarely held that double jeopardy principles require the vacatur of the lesser-included conspiracy convictions, the the greater-CCE offenseis affirmed on direct appeal review. Pet. at 15-17; Opp Br.- 6(citing cases).

Finally on this point; the Court, at the time that Jeffers was decided, did not have available to it the reasoning and authority of Ball v. United States as a lens through which to review (and a tool by which to resolve) the controversy sub judice:[3./]

> "This Court has consistently relied on the test of statutory construction stated in Blockburger v. United States, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two separate criminal provisions. The appropiate inquiry under Blockburger is whether each provision requires proof of a fact which the other does not. The assumption underlying the Blockburger rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. For purposes of applying the Blockburger test in this setting as a means of ascertaining congressional intent, "punishment" must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing compondent. Id., 470 U.S. at 861 (citations omitted). . .
>
> "Having concluded that Congress did not intend petitior's conduct to be punishable under §§ 922(h) and 1202(a), the only remedy consistent with congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. . .One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." 470 U.S. 864.

3./ At thisjuncture, an important clarification regarding one aspect of the controversy between the parites -- an aspect the misconceives to be non-existent -- is now appropiate. Though the Government concedes "that in light of Jeffers v. United States, supra, it would be error for a court to impose more than a single special assessment for conviction on a CCE count and coterminous conspiracy counts, so the special assessment statute [18 U.S.C. § 3015], if properly applied, should never result in increased penalties for multiple convictions in this setting (Opp Br.- 8);" the Government erroneously states that this error was not committed by the District Court ("the district court did not order a special assessment in this case, so petitioner has suffered no injury on that account," Opp Br.8). The Pro Se Appendix, which includes the transcript of resentencing, A-35-36, demonstrates that the special assessment was reimposed at resentening.

The Government, evading the thrust of the Petitioner's argument that a separate conviction for conspiracy offenses which are coterminous with a CCE offense is Congressionally unintended punishment for the same conduct, i.e., the lesser-included conspiracies vis' a vis' the "in concert with" element of the grater CCE offense,[4./] attempts instead to disguishable Ball from the case sub judice, on the disparate similarity of perceived adverse collateral consequences -- consequences which the Court in Ball stated "may not be ignored." 470 U.S. 865. Opp Br.-8. The Government further contends that the remedy of vacating the conspiracy convictions is inappropiate, because if the CCE offense was reversed for some reason superflous to the vitality of the lesser-included conspiracy, the Petitioner would somehow escape all punishment. For this argument, the Government relies heavily on the Seventh Circuit's decision in United States v. Bond (a case of dubious value for the proposition the Government relies upon it to support, since Bond -- apart from its other shortcommings identified at n. 9 of the Petition -- held that concurrent sentences on the CCE and conspiracy count would not offend double jeopardy: a proposition rejected by every circuit otherthan the Seventh Circuit, Pet., 15-17). The short answer to this argument is that unless Congress intended separate convictions to exist for both conspiracy and CCE convictions, there simply is no authority for permitting the lesser-included offense conviction forthe same conduct to stand consistently with this Court's double jeopardy jurisprudence.

4./ The Government does no dispute that, in the present context of a CCE offense and lesser-included conspiracy offenses which are coterminous, the conspiracies and the "in concert with" element of the CCE offense represent the same conduct. Indeed, Jeffers v. United States, supra, 432 U.S. 148 & n.14 would make such an argument specious, because the Court determined there that "in concert" activity and "conspiracy" are the same thing.

There is no indicia in any of the decisions of this Court -- and the Government glaringly neglects to cite a Supreme Court decision to the effect -- that the double jeopardy of the Fifth Amendment is authority for lower courts to fashion safety nets to prevent a defendant from escaping punishment on a lesser included offense, in the in futuro event the defendant somehow manages to get his greater offense conviction overturned on grounds that do not affect the lesser included offense. It is novel indeed that the Framers, in developing the Fifth Amendment, intended the double jeopardy clause as a device to protect society from a convicted defendants escape from punishment -- punishment, by definition of being the same thing as conduct proscribed by the greater offense, this Petitioner contends that Congress did not intend for him to suffer. May it please the Court to query: has the double jeopardy clause of the Fifth Amendment become such an ephemeral safeguard, that a criminal defendant can be denied its current protection against suffering multiple forms of unintended punishment, on the strength of a future and conjectural possibility-- a possibility not current in controversy in a case before an Article III court -- that a defendant may escape all punishment on his lesser-included offense if the greater offense is somehow overturned? This Petitioner does not think any such proposition can be squared with this Court's double jeopardy jurisprudence. Indeed, soeciety is no more offended by the vacatur of lesser-included offense convictions when the greater offense conviction is affirmed on direct appeal, than it is when lesser included convictions for the same offense, per force of thedouble jeopardy clause, are forever barred once the greater offense conviction has been affirmed on direct appeal. Jeffers v. United States, supra, 432 U.S. 150.

The point that the Government overlooks in its Opposition, is that if Congress did not intend multiple punishment to exist for both a greater and lesser-included offense; only a single punishment is authorized. Hence, if the Court would decide upon certiorari review(as the Petitioner urges), that Congress did not intend for the lesser-included conspiracy convictions to exist coterminously with a conviction on the CCE offense after the same has been affirmed on direct appeal; petitioner would be entitled to have the relief that the majority of the courts of appeals have held a CCE defendant is entitled -- not because it is a matter of "booking keeping" prerogative (as the Government suggests, Opp Br. at 10) --but because this is what Congressional intent and the double jeopardy clause require.

SUMMARY

The rationale of Ball v. United States is relevant to the merits of the Petitioner's case, so long as the Court can determine, as have several lower courts of appeals, that vacating the lesser-included conviction is the only remedy consistent with Congressional intent and the constitutional command of double jeopardy jurisprudence ofthis Court. The Government has identified no case where the conspiracy convictions were vacated, that this was purportedly done on the grounds of "book keeping" vis' a vis' the reasoning of these courts that this is what the double jeopardy jurisprudence of this Court required. Moreover, besides the point of collateral consequences that would inure to the Petitioner's detriment (as in the case in Ball) were the lesser-included conspiracy convictions to remain in force (Pet. at 26); the fact remains that the Government concedes the special assessment penalty is impermissible punishment in this context (Opp Br. at 8); and the record shows that

the Petitioner suffers this impermisible penalty simply because his convictions for the conspiracy offenses remain in force. Pro Se Appendix, A-35-36. The premise upon which the United States would justify this result, i.e., "Unlike the situation in Ball in which discrete status were not directed to separate evils, the narcotics conspriacy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes (Opp Br. at 4)," fundmentally incorrect. The CCE and conspiracy statutes are not directed to different purposes; rather, these statutes are directed to the same purpose albeit to a different degree of severity: the punishment of confederated narcotics initiatives involving in concert activity. The Government's effort to evade the stricture of Ball, is really old-hat argument that was repudiated soundly by the Court in Jeffers:

> "The Government's principal argument for affirming the judgement of the Court of Appeals is that Ianelli controls this case. Like the conspiracy and gambling statutes at issue in Iannelli, the conspiracy and continuing-criminal-enterprise statutes at issue here, in the Government's view, create two separate offenses under the "same evidence" test of Blockburger. The Government's position is premised on its contention that agreement is not an essential element of the §848 offense, despite the presence in §848(b)(2)(A) of the phrase "in concert with. . . . Section 848(b)(2)(A) restricts the definition of the crime to a continuing series of violations undertaken by the accused "in concert with five or more other persons." Clearly, then, a conviction would be impossible unless concerted activity were present. . . . Even if § 848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy. It would be unreasonable to assume that Congress did not mean anything at all when it inserted these critical words." 5./ Id., 432 U.S. 148.

5./ At n. 14 in Jeffers, supra, the Court pointed out: "Since the "concert" commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandomed." To-date, Congress has not altered this Court's construction, though § 848 has been amended.

The confusion amongst the lower federal courts of appeals in this intensively litigated area of the criminal law, can be settled only by the Court deciding whether -- as the Petitioner strenously contends (and the majority of lower courts have held) -- conspiracy offenses are lesser-included offenses of the CCE statute. And, if so, whether the"convictions" on the lesser included-conspiracies (particularly in view of the special assessment penalties, but not exclusively so in view of collateral consequences which affect §848 convictees like federal criminal defendants whom have been adjudged guilty of their crimes 6./), constitute unauthorized punishment as the Court determined in Ball. Contra the assertions of the Government, the myriad of opinion on this important question amongst the federal courts of appeals, beckons the need for the type settlement of the law that only the Supreme Court of the United States can provide. Petitioner beseeches the Court to undertake certiorari review in this case and speak to subdue the burgeoning tempest of conflicting opinions of the courts of appeals on these points.

Respectfully submitted,

MAY 2, 1991.

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6./ Cf., United States v. Mendoza, 902 F.2d 693, 697-98 ((8th Cir. 1990)(discussing collateral consequences which flow from maintenance of unintended convictions)

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUARDO FERNANDEZ - PETITIONER PRO SE

v.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.3, that service of the foregoing "PETITIONER'S REPLY BRIEF PURSUANT TO SUPREME COURT RULE 15.6, was made upon the SOLICITOR GENERAL OF THE UNITED STATES , c/o/ Joel M. Gershowitz, Esquire - Attorney - U.S. Department of Justice, Washington, D.C. 20530, counsel for the Respondent, the United States of America, by depositing the same in the Prisoners Mail Box at the United States Penitentiary, Lewisburg , Pennsylvania, with First Class Postage affixed and pre-paid.

CARLOS EDUARDO FERNANDEZ, #22871-004
United States Penitentiary
P.O. Box 1000
Lewisburg, Pennsylvania 17837

Petitioner Pro Se

May 2, 1991.

Clerk of Court
Supreme Court of the United States
Washington, D.C. 20543

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Re: CARLOS EDUARDO FERNANDEZ v. UNITED STATES OF AMERICA,
Docket No. 90-7210

Subject: Original and 9 copies of PETITIONER'S REPLY BRIEF PURSUANT TO SUPREME COURT RULE 15.6

Dear Honorable ClerK:

Please find enclosed the above captioned documents which are submitted for filing and distribution to the Justices as provided for by Supreme Court Rule 15.6.

You will note a Certificate of Service is appended to the Original Manuscript (and each of the 9 enclosed copies) verifying the fact that service has appropiately been made upon the Solicitor General of the United States.

Your kind attention to this matter will be appreciated.

Very sincerely yours,

Carlos Eduardo Fernandez,
#22871-004
United States Penitentiary
P.O. Box 1000
Lewisburg, Pa. 17837

Petitioner Pro Se

Enclosures/

cc: Solicitor General of the United States

File

(5)

SUPREME COURT OF THE UNITED STATES

CARLOS EDUARDO FERNANDEZ *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-7210. Decided May 28, 1991

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

This case presents the question of whether drug conspiracy convictions must be vacated on double jeopardy grounds in light of an additional conviction for engaging in a continuing criminal enterprise. I would grant certiorari to resolve the confusion that this question has caused among the courts of appeals.

Petitioner Carlos Fernandez was convicted on one count of conspiring to distribute and possess cocaine, 21 U. S. C. § 841(a)(1); one count of conspiring to import cocaine, 21 U. S. C. § 952(a); one count of engaging in a continuing criminal enterprise (CCE), 21 U. S. C. § 848; and five counts of using a telephone to facilitate a drug offense, 21 U. S. C. § 843(b). On appeal, Fernandez argued that the District Court should have vacated his conspiracy convictions to prevent cumulative punishment since these were predicate offenses for his continuing criminal enterprise conviction. The Court of Appeals rejected Fernandez' claim and affirmed. *Fernandez* v. *United States*, 916 F. 2d 125 (CA3 1990). As the court acknowledged, its holding is inconsistent with the decisions of other courts of appeals. *Id.*, at 128–129. The majority to have considered the issue require the vacation of a drug conspiracy conviction when it is a predicate to a CCE conviction. See, *e. g.*, *United States* v. *Rivera*, 900 F. 2d 1462, 1478 (CA10 1990); *United States* v. *Hernandez-Escarsega*, 886 F. 2d 1560, 1582 (CA9 1989); *United States* v.

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Possick, 849 F. 2d 332, 341 (CA8 1988). The Court of Appeals for the Second Circuit has adopted a somewhat different approach, "combining" the convictions without vacating those on the lesser counts and then imposing a single sentence. *United States* v. *Aiello*, 771 F. 2d 621, 632–635 (CA2 1985). Conversely, the Court of Appeals for the Seventh Circuit not only permits predicate conspiracy convictions to stand, but goes beyond the Third Circuit in letting stand concurrent sentences. *United States* v. *Bond*, 847 F. 2d 1233, 1238–1239 (CA7 1988).

This evident disarray among the courts of appeals calls for a grant of certiorari.